Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MICHAEL R. WALL,

Petitioner,

v.

GTE SOUTHWEST INCORPORATED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under *St. Mary's Honor Center v. Hicks* an employee in an Americans With Disabilities Act claim is required to establish a *prima facie* case of disability discrimination if there is direct evidence of a per se violation of the Act, i.e., when the employer states that a full duty release is a prerequisite to returning to work.

2. Whether in light of *St. Mary's Honor Center v. Hicks*, an employer can obtain summary judgment in an Americans With Disabilities Act claim without ever articulating what efforts, if any, the employer made to determine if the disabled employee could be reasonably accommodated.

3. What constitutes a showing of a *prima facie* case of discrimination under the Americans With Disabilities Act, and was Petitioner's summary judgment evidence sufficient to establish that he was "otherwise qualified" to perform his job.

4. Whether the Federal Rules of Civil Procedure and *St. Mary's Honor Center v. Hicks* permit a court to grant summary judgment on a Americans With Disabilities Act retaliation claim when the employer's stated reason for the adverse employment act is a per se violation of the Americans With Disabilities Act.

5. Whether the Federal Rules of Civil Procedure permit a court to grant summary judgment on a Tex. Lab. Code Ann. § 21.105 (Vernon Supp. 1995) claim when the summary judgment evidence, even if "scanty", establishes material fact issues regarding Petitioner's ability to perform a job despite his disability.

QUESTIONS PRESENTED FOR REVIEW – Continued

6. Whether the Federal Rules of Civil Procedure permit a court to grant summary judgment on a Tex. Lab. Code Ann. § 451.001 (Vernon Supp, 1995) claim when the summary judgment evidence, even if "scanty", establishes material fact issues regarding the existence of a causal connection between an employee's workers' compensation proceeding and adverse employment actions taken against the employee.

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

A. Michael R. Wall, Petitioner

B. John E. Wall, Jr., Attorney for Petitioner

C. GTE Southwest Incorporated, Respondent

D. Kathleen Bagwell Palter and J. Cody Wilbanks, Attorneys for GTE Southwest Incorporated, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner, Michael R. Wall ("Wall") brought suit against his former employer, Respondent, GTE Southwest Incorporated ("GTE"), pursuant to article 8307c of the Texas Workers' Compensation Act, the Americans With Disabilities Act and the Texas Commission on Human Rights Act. GTE filed a Motion for Dismissal or Summary Judgment with Supporting Brief as to all claims.

In an Opinion dated May 31, 1994, the United States District Court for the Northern District of Texas, Barefoot Sanders presiding, denied GTE's motion for dismissal,

but granted summary judgment as to all of Wall's claims.[1] The district court found that Wall failed to establish a *prima facie* case of retaliation and discrimination under both the Americans With Disabilities Act ("ADA") and the Texas Commission on Human Rights Act. In making this determination, the district court found that the Fifth Circuit had yet to set forth the elements of a *prima facie* case under the ADA. The district court also found that Wall failed to establish a causal connection between his workers' compensation claim and the adverse employment actions taken against him.

Wall timely appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. On May 8, 1995, the Fifth Circuit affirmed the ruling of the district court.[2] Regardless of the need for guidance as to the elements of a *prima facie* ADA case as well as the burden an employer must meet to establish compliance with the ADA as a matter of law, the Fifth Circuit claimed the case had no precedential value and affirmed the case without writing an opinion. Specifically, the Fifth Circuit stated as follows: "Affirmed. See Fifth Circuit Rule 47.6".[3] *See*, Appendix A. In affirming the district court, the Fifth Circuit not only failed to set forth much needed precedential ADA case law; but also ignored the summary judgment evidence supporting Wall's claims.

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[1] This unpublished opinion is printed here as Appendix B.

[2] This unpublished opinion is printed here as Appendix A.

[3] Fifth Circuit Local Rule 47.6 is printed here as Appendix D.

JURISDICTION

This petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit made and entered on May 8, 1995. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Suit was initially filed in state district court; however, Respondent removed this cause to the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1441. Respondent argued that removal was proper based on preemption under Section 301 of the Labor Management Relations Act.[4]

In this case, Petitioner, Michael R. Wall began working for Respondent, GTE Southwest Incorporated, as a Customer Service Specialist ("CSS") on September 13, 1982. (ROA 250).[5] As a CSS, Wall traveled to GTE's customers' locations to perform installations and repairs on residential and small business telephones. (ROA 250).

On March 6, 1992, Wall suffered a back injury while on the job, working out of GTE's Plano facility. (ROA 250). Wall was taken off from work by his doctor. (ROA 250). After having been off from work as a result of the March 6, 1992 on-the-job injury, Wall returned to work at

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[4] The federal district court rejected Respondent's preemption argument in its May 31, 1994 opinion. (ROA 383-84).

[5] ROA refers to the Record on Appeal in this case.

GTE in approximately July 1992 with permanent restrictions placed on him by his doctor. (ROA 250). Specifically, Wall was released by his treating physician to return to work at his CSS job on a "trial basis" working approximately 4 hours/day with some various physical restrictions. (ROA 250-51). Wall was to follow up with his physician in two weeks to see how he was adjusting at his CSS job with the restrictions. (ROA 251).

Wall was employed as a CSS, but upon his return to work, GTE placed him in a light duty position rather than placing him in his former CSS position. (ROA 251). After Wall was placed under the permanent restrictions by his physicians, GTE never gave Wall the chance or the option to return to his CSS position on a trial basis, either with or without reasonable accommodation. (ROA 251). GTE made no effort to accommodate Wall's disability so as to enable him to perform his CSS job. (ROA 251).

On or about September 17, 1992, Fred Chasak, Wall's supervisor, informed Wall and Robert Grimes (another GTE employee on light duty after an on-the-job injury) that there were four people on light duty. (ROA 252). Chasak told Grimes and Wall that they were being removed from light duty work and placed back on workers' compensation. (ROA 252). According to Chasak, there was not enough light duty work for four employees and that he was placing Wall and Grimes back on workers' compensation. (ROA 252). Bo Ellerbee and Jim Chlebowski, were the other two employees who had previously been working on light duty with Grimes and Wall. (ROA 252). In actuality, Chlebowski was no longer on light duty at this time, but rather had been released to return to full duty work on or about September 14, 1992.

(ROA 252). Thus, contrary to GTE's claim, Chlebowski's light duty position was available on September 17, 1992. (ROA 70, 207, 252).

After Wall was removed from light duty, he later called Barbara Hanson, a union steward, to see what he would need to do in order to return to work. (ROA 252). According to Hanson, Chasak stated that before Grimes and Wall could return to work they would have to receive a full duty release from their doctors or more light duty would have to become available. (ROA 252). Gina Logan, Wall's former supervisor, stated that Wall would have to obtain a full medical release before he could return to a full duty position. (ROA 208). Wall would never receive a full duty release because Wall's restrictions were permanent. (ROA 251). When more light duty became available, GTE did not offer it to Wall but rather filled the position with another employee. (ROA 252-53).

Wall was never offered another light duty position. (ROA 253). Wall was not offered Chlebowski's former light duty position. (ROA 252). By GTE's own admission, Wall, as the next most senior employee, should not have been removed from light duty in September 1992. (ROA 70, 207). Nevertheless, Wall was removed from the workplace. (ROA 252). Thus, Wall was terminated, as opposed to having abandoned his job. (ROA 253).

As of September 17, 1992, GTE failed to allow Wall to return to work and failed to otherwise accommodate Wall's disability. (ROA 251-53). As a result, Wall filed suit to recover damages which he suffered as a result of the actions of GTE which are prohibited under article 8307c of the Texas Workers' Compensation Act ("8307c"), Article 5221k of the Texas Commission on Human Rights Act

("TCHRA") and the Americans With Disabilities Act ("ADA"). (ROA 42-44).

GTE's position that Wall would not be permitted to return to his CSS job without a full duty release is a per se violation of the ADA. Also, GTE failed to articulate in its summary judgment evidence that it made any attempt to accommodate Wall's disability. Nevertheless, GTE's motion for summary judgment was granted by the district court and the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1. **The Fifth Circuit's failure to articulate the requirements for establishing a *prima facie* case of discrimination under the Americans With Disabilities Act has left the district courts and litigants of the Fifth Circuit to play an inconsistent guessing game as to whether elements such as replacement by a non-disabled employee are required to establish liability under the ADA.**

In most instances, claims of employment discrimination involve a three-step proof analysis. A plaintiff must establish a *prima facie* case of discrimination. This is followed by the employer defendant's attempt to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Finally, should defendant be successful, then the plaintiff is allowed to prove, directly or indirectly, that the explanation put forth by defendant is a pretext for discrimination. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The district court applied this burden shifting scheme to the present case involving the Americans With

Disabilities Act ("ADA").[6] In its opinion, the district court found that the Fifth Circuit has not yet articulated the elements for a *prima facie* case of discrimination under the ADA. (ROA 392). The district court noted that some courts have found that to make a *prima facie* case of discrimination under the ADA, the employee must show that he was replaced by a non-disabled person. (ROA 392-93). In granting summary judgment, the district court found that there was no summary judgment evidence that Wall was replaced by a non-disabled person.[7] (ROA 392-93). On appeal, Wall disputed this requirement for a *prima facie* showing, and set forth his interpretation of the *prima facie* requirements (see below). Regardless of the need for precedential case law, the Fifth Circuit affirmed without setting forth the requirements for a *prima facie* ADA case; thereby, leaving the district courts as well as litigants without guidance as to the elements an employee must establish to maintain a cause of action under the ADA.

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[6] The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a) (West Supp. 1995).

[7] In support of this requirement, the district court cited *Sherman v. Optical Imaging Systems, Inc.*, 843 F.Supp. 1168, 1181 (E.D. Mich. 1994) and *Jones v. Grindstaff*, 1993 WL 498957 (E.D. Tenn. 1993). (ROA 393). Even if this were established to be a *prima facie* requirement, it would not apply to bar this case, because by GTE's own admission, an employee could not be placed in a CSS position without a full medical release. (ROA 208).

In passing the ADA, it appears that the legislature intended that case law established under the Rehabilitation Act of 1973 be used in deciding cases brought under the ADA. *See*, 42 U.S.C. § 12117(b). The Fifth Circuit has noted that the *prima facie* case and the available defenses under the ADA are similar to the Rehabilitation Act. *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993). In accordance with *Chandler*[8] and the legislative intent, a *prima facie* case of discrimination under the ADA appears as follows: (1) the employee is disabled as that term is defined in the ADA[9]; (2) the employee is otherwise qualified to perform his job; (3) the employee was subjected to an adverse employment action.[10]

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[8] The Fifth Circuit has held that the elements for a *prima facie* case of discrimination under the Rehabilitation Act are as follows: (1) the employee is an individual with a handicap as that term is defined in the ACT; (2) the employee is otherwise qualified to perform his job; (3) the employee is employed by a program receiving federal financial assistance; and (4) the employee was adversely treated. *See, Chandler v. City of Dallas*, 2 F.3d 1385.

[9] The ADA defines a disability as: a physical or mental impairment that substantially limits one or more of an individual's major life activities; a record of such impairment; or being regarded as having such an impairment. *See*, 42 U.S.C. § 12102(a)-(c); *Coughlan v. Heinz*, 851 F.Supp. 808 (N.D. Tex. 1994). In this case, Wall has a back injury which limits his mobility, and his ability to lift, carry and stand. (ROA 209, 250-51). The district court properly found that Wall has a "disability" as that term is defined under the ADA. (ROA 388).

[10] GTE failed to accommodate Wall's disability and ultimately terminated him which constitutes an adverse employment action for the purposes of establishing a *prima facie* case. (ROA 251-53).

The district court found that Wall was not "otherwise qualified"[11] for the CSS job, and the Fifth Circuit affirmed. (ROA 388-89, 392). The district court reasoned that Wall was unable to perform all of the essential functions of his CSS job, and that the summary judgment evidence did not raise a fact issue as to whether reasonable accommodation would enable Wall to perform the essential functions of the job. (ROA 391). The Court's reasoning is flawed because: (1) the summary judgment evidence established that Wall could perform the essential elements of his job; and (2) GTE never articulated what efforts, if any, were made to accommodate Wall.

2. In an Americans With Disabilities Act case, summary judgment is not properly based solely on the employer's version of the "essential functions" of a job, particularly when the employee presents controverting evidence.

The flawed ruling that Wall was not "otherwise qualified" hinged on a determination of the essential functions of the CSS job. The district court disregarded the summary judgment evidence presented by Wall regarding his actual duties as a CSS, and exclusively relied on GTE's claimed version of the essential functions of the job. (ROA 389-91). The determination of the functions of Wall's CSS job should have been left for the factfinder in light of the conflicting summary judgment evidence.

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[11] The ADA defines an "otherwise qualified" person as a disabled person, who, either with or without reasonable accommodations, can perform the essential functions of the job he holds or desires. 42 U.S.C. § 12111(8).

Specifically, Wall had various lifting and carrying restrictions with the maximum weight allowed being 58 pounds. (ROA 209). Wall presented summary judgment evidence that frequent heavy lifting was not required, and that he could stay within his restrictions and still perform the CSS duties. (ROA 251, 259). In contrast, GTE claimed that frequent lifting of up to 60 pounds was required. (ROA 311). There was also conflicting evidence regarding whether the job could be performed in a 4 hour shift, which Wall was restricted to, rather than an 8 hour shift. (ROA 209, 250-51, 310-11). Wall presented summary judgment evidence that the CSS job could be performed in 4 hour shifts, and GTE maintained that an 8 hour shift was essential. (ROA 250, 310-11). There was further conflicting evidence regarding the length of time a CSS was required to spend on a ladder. (ROA 251, 310). Wall stated that in the Plano area, where he was assigned to work as a CSS, 90% of the cable was buried and that he did not spend significant time on a ladder or carrying a ladder. (ROA 251, 259). In contrast, GTE claimed that a CSS spends a significant amount of time on a ladder. (ROA 310).

The district court improperly ignored Wall's summary judgment evidence regarding the essential functions of a CSS job.[12] (ROA 391). The legislative intent

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[12] Indeed, as the district court recognized, the ADA gives some weight to an employer's definition of the essential functions of a job. (ROA 391). Section 12111(8) provides that, "[f]or purposes of this subchapter, consideration shall be given to the employer's judgment as to what job functions are essential . . . " 42 U.S.C. § 12111(8). However, contrary to the district court's approach, the ADA does not state that *sole* consideration is to be

regarding the essential elements provision of the ADA was for consideration to be given to the essential elements identified by the employer as well as the employee. *See*, H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 34 (1990).[13] By disregarding Wall's summary judgment evidence of the essential functions of the job, the district court not only disregarded the legislative intent behind the ADA, but also determined fact issues which should have been left for the factfinder at trial.[14]

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given to the employer's definition of the essential job elements. *See, Id.*

[13] An employer's judgement regarding the essential functions of a job is not conclusive and does not raise any presumption that a particular task is essential.

[14] The district court erred by analogizing this case with *Florence v. Frank*, 774 F.Supp. 1054 (N.D. Tex. 1991). In *Florence*, the court determined that the plaintiff mail carrier was not able to perform the essential functions of the job, even with reasonable accommodations, because he could only work four hours of an eight hour job, and because his physical limitations prevented him from hand delivery of the mail. *Id.* at 1061-1062. The present case is clearly distinguishable from *Florence*. It was determined in *Florence*, that the plaintiff was required to deliver the mail for five out of the eight working hours per day and that the route required walking. *Id.* The *Florence* court also found no alternative means to deliver the mail on this particular route other than by walking the minimum 5 hour route. *See, Florence v. Frank*, 774 F.Supp. at 1062 (plaintiff was not able to perform essential functions of job through any reasonable accommodations and the defendant would not be required to purchase a motorized vehicle). In this case, the essential functions of the CSS job are not so inflexible. There are disputed questions of material fact concerning what is required of a CSS, and whether GTE could have reasonably accommodated Wall.

Consequently, the district court erred in ruling that Wall could not establish a *prima facie* case of discrimination under the ADA, and the Fifth Circuit erred in affirming.

3. To allow an employer to obtain summary judgment without ever articulating that any efforts were made to accommodate an employee's disability flies in the face of the purpose of the Americans With Disabilities Act as well as the evidentiary requirements of *St. Mary's Honor Center v. Hicks.*

The district court further erred in granting summary judgment because there is no summary judgment evidence that GTE made any effort to reasonably accommodate Wall's disability, despite its duty to do so under the ADA. An employer has an obligation to make reasonable accommodations for a disabled individual, unless accommodation would produce undue hardship on the employer. 42 U.S.C § 12112(b)(5) (West Supp. 1995). GTE committed a per se violation of the ADA by failing to accommodate, or even attempt to accommodate, Wall's disability. Wall presented summary judgment evidence that reasonable accommodation would have permitted Wall to perform his CSS job, yet GTE failed to present any summary judgment evidence that it made even a single effort to accommodate Wall at the time he returned to work. GTE clearly failed to meet its burden of establishing a legitimate non-discriminatory reason for its failure

to accommodate Wall; therefore, intentional discrimination is inferred and summary judgment is improper. *See, St. Mary's Honor Center v. Hicks*, 113 S.Ct. at 2747.

Instead of placing Wall in his CSS position on a trial basis as his doctor had recommended, GTE, without any investigation, somehow determined that Wall could not perform his CSS job. There was no summary judgment evidence that, at the time Wall presented for work, GTE made any analysis of whether reasonable accommodations could be made for Wall. No doubt the reason GTE failed to present such evidence is because no efforts were made at the time. Instead, GTE only presents an after-the-fact affidavit of Terry Lumpkin wherein he claims that Wall's restrictions could not be accommodated. Not only is GTE's failure to make efforts to accommodate Wall at the time he presented for work a per se violation of the ADA, but Wall presented summary judgment evidence which disputes Lumpkin's affidavit, and establishes alternative means by which he could have performed his CSS job without causing undue hardship on GTE.[15] Thus, GTE failed to meets its burden of production under *St. Mary's* and violated the ADA as well by failing to make efforts to accommodate Wall in his CSS job.

GTE further violated the ADA by making Wall perform light duty work and then terminating him allegedly because there was not enough light duty work. (ROA

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[15] For instance, Wall, who had been performing the CSS job prior to his injury, states in his affidavit that he could have performed his CSS duties during 4 hour shifts, despite his restrictions. (ROA 251-52). Also, other GTE workers had performed the CSS duties in 4 hour shifts in the past. (ROA 259).

251-52). GTE claimed that Wall was removed from the workplace because there was not enough light duty; however, the summary judgment evidence directly controverts this claim. (ROA 70, 207, 252). Moreover, this claim of a "lack of light duty work" does not satisfy GTE's burden of production under *St. Mary's* because GTE violated the ADA by placing Wall on light duty without first attempting to accommodate his CSS job. In reports on the ADA, several congressional committees stated that the employer should not even consider transferring a disabled employee to a vacant position until the employer has attempted to accommodate him/her in the job that he currently holds.[16] *See*, S. REP. No. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990). Also, contrary to GTE's actions, the ADA requires job restructuring when it is reasonable. 42 U.S.C. § 12111(9)(B).[17] The ADA specifically provides for part-time or modified work schedules as a "reasonable accommodation". 42 U.S.C.A. § 12111(9)(B). GTE's failure to make efforts to accommodate Wall in his CSS position violates the ADA and precludes summary judgment under *St. Mary's*.

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[16] Allowing a disabled employee to attempt the essential functions of the job which he currently holds before he/she is transferred to a new, vacant position is a form of accommodation which complies with the legislative intent behind the ADA. *See*, 56 Fed. Reg. 35,744 (1991).

[17] Among the considerations which Congress has mentioned are: redelegating certain assignments; permitting a disabled employee to switch assignments with other employees; and redesigning procedures for accomplishing tasks. S. REP. No. 116, 101st Cong., 1st Sess. 31 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 62 (1990).

4. GTE's requirement that Wall obtain a full duty release prior to returning to his CSS job is direct evidence of a per se violation of the Americans With Disabilities Act.

GTE placed Wall on light duty for a period of time, but ultimately removed him from light duty and informed him that he could not return to his CSS job without a full duty release. (ROA 207-08). Such actions are anecdotal testimony and constitute direct evidence of a violation of the ADA. To accept GTE's position, Wall could not return to his CSS position even if his restrictions consisted of lifting no more than 5000 pounds on a repetitive basis, i.e., Wall could not return to work without a full release even if his restrictions could be reasonably accommodated. In the presence of direct evidence of discrimination, the employee need not even jump through the evidentiary hoops of *St. Mary's Honor Center v. Hicks*. Thus, the district court erred in granting summary judgment on Wall's discrimination and retaliation claims brought under the ADA.

5. GTE's failure to accommodate Wall establishes the requisite causal connection in a retaliation claim under the Americans With Disabilities Act.

The district court erred in holding that Wall failed to establish a *prima facie* case of retaliation under the ADA. (ROA 386). A *prima facie* case of retaliation is as follows: (1) a showing that the employee engaged in a protected activity; (2) an adverse employment action was taken against the employee; (3) and that a causal connection exists between the adverse employment action and the

participation in the protected activity. *See*, ROA 386, *citing, Harmer v. Virginia Elec. and Power Co.*, 831 F.Supp. 1300, 1308 (E.D. Va. 1993).

In this case, Wall filed charges of discrimination with the EEOC against GTE and requested that his disability be accommodated by placing him in his former position on a trial basis. (ROA 251-54). Wall was denied reasonable accommodations for his CSS job and was ultimately eliminated from the workforce. (ROA 251-53). A "causal connection" is evidenced in that Wall filed discrimination charges with the EEOC prior to his release to return to work in July 1992, yet after being released to return to his CSS position, he was not permitted to do so. (ROA 250-51, 257). Instead, Wall was placed on light duty and was then eliminated from the workplace allegedly because there was not enough light duty work for 4 employees. (ROA 252). This establishes material fact issues regarding whether there is a causal connection between the filing of the discrimination charges and the subsequent refusal to accommodate and termination. The Fifth Circuit erred in affirming summary judgment, particularly in light of GTE's blatant failure to accommodate Wall in violation of the ADA. (ROA 208, 386).

6. **Even if an employer's failure to accommodate and "full medical release" requirements are not considered per se ADA violations, such conduct is evidence of the employer's unlawful motive and precludes summary judgment on Petitioner's ADA discrimination and retaliation claims under *St. Mary's Honor Center v. Hicks*.**

If it is somehow determined that GTE met its burden of production, which it has not, Wall must be given the opportunity to show that the reason asserted is pretextual. *See, St. Mary's Honor Center v. Hicks*, 113 S.Ct. at 2747-50. Justice Scalia writing for this Court in *St. Mary's* reasoned that "[t]he factfinder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional discrimination." *Id.* This Court in *St. Mary's* further held that "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*.' " (emphasis in original) *Id.*

Wall presented ample summary judgment evidence in this case which establishes material fact issues regarding whether GTE's stated reason, or lack thereof, for failing to accommodate Wall and ultimately removing Wall from the workplace was a pretext for discrimination and/or retaliation. (ROA 70, 207-08, 251-54, 259, 261). The district court ignored this evidence and disposed of the entire case via summary judgment, and the Fifth Circuit affirmed. (ROA 385, 388-89, 392-93). This was error because, as previously discussed, there are material fact

issues as to Wall's ability to present a *prima facie* case of discrimination and retaliation, and there are material fact issues regarding whether GTE's stated reasons for its adverse employment actions were a pretext.

Discrimination: Removal from the Workplace

GTE argued in its motion for summary judgment that Wall's discrimination claims must fail because he was allegedly removed from light duty work based on a seniority system. (ROA 66). Here, GTE faces serious credibility problems. Specifically, GTE claims that there was only enough light duty work for two employees, and that Chlebowski and Ellerbee were allegedly retained over Grimes and Wall based on seniority. (ROA 70, 207). In actuality, Chlebowski was released to regular duty prior to the time Wall was removed from light duty; thereby, leaving a light duty position open for Wall, the next most senior employee. (ROA 70, 252). Thus, by GTE's own admission, Wall should not have been removed from light duty in September 1992. Also, after Wall was removed from light duty, seniority was not a factor in GTE's requirements for Wall's return to work. Instead, Wall was told that he would have to have his restrictions (which were permanent) removed before he could return to work. (ROA 251-52). Also, GTE does not claim that seniority factored into another employee being placed on light duty instead of Wall after Wall was removed from light duty. (ROA 253). This raises genuine issues of material fact regarding GTE's credibility and the true reason Wall was removed from light duty, i.e., terminated. The Fifth Circuit has held that discrepancies in testimony

raise credibility issues which are properly for the fact-finder to weigh. *See, Dibidale of Louisiana, Inc. v. American Bank & Trust Co., New Orleans*, 916 F.2d 300, 307 (5th Cir. 1990), *citing Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980). Indeed, the *Dibidale* court held that "credibility assessments are not fit grist for the summary judgment mill." *Id.* at 307.

In light of Chlebowski's return to regular duty and another employee being placed on light duty instead of Wall, the seniority issue only further substantiates Wall's discrimination claims and the unlawful motives for GTE's conduct. Thus, the district court erred in granting summary judgment, and the Fifth Circuit erred in affirming.

Discrimination: Wall was Terminated

GTE also claimed that Wall was not discriminated against because he was not terminated, but rather he abandoned his job. (ROA 65). Contrary to GTE's claim, Wall did not abandon his job. (ROA 253). It was GTE who informed Wall that he would not be returning to work, i.e., that removal of his permanent restrictions was required. (ROA 252). As previously stated, such a condition violates the ADA, and prevented Wall from being able to return to his CSS job. There are genuine issues of material fact regarding whether GTE's refusal to allow Wall, an employee with permanent restrictions, to return to work until he had a full duty release constitutes a discriminatory and retaliatory termination.

Retaliation: Time and Manner of Employer Response

The close proximity in time between Wall's post March 1992 charge of discrimination and the July 1992 refusal to accommodate and September 1992 termination establishes material fact issues regarding whether Wall was retaliated against by GTE. The Fifth Circuit has held that the proximity in time between the participation in the protected activity and the adverse employment action may be considered when determining whether retaliation occurred. *See, Shirley v. Chrysler First, Inc.*, 970 F.2d at 44 (14 month lapse in time between participation is the protected activity and the adverse employment action did not preclude liability for retaliation).

The Fifth Circuit has also recognized that evidence of an employer's hostile reaction to an employee's complaints of discrimination may be used to support a claim for retaliation. *See, Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994). In this case, GTE displayed a hostile attitude toward Wall when it refused to accommodate him and then removed him from light duty. (ROA 251-52). Wall's removal from light duty was especially hostile because the reason given to Wall for the removal was unfounded. (ROA 252). It is clear from the summary judgment evidence that if GTE followed its seniority system, Wall should not have been removed from light duty on September 17, 1992. This is further evidence of the pretextual nature of GTE's stated reason for eliminating Wall. *See, Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991) (if it appears to the factfinder that the employer seems to have made a large mistake regarding an employment decision, then the question arises as to whether the decision was a mistake

at all, or rather is a pretext for discrimination); *See also, Brown v. Gerrard Mfg. Co.*, 634 F.2d 273 (5th Cir. 1981) (when a defendant departs from its usual practices or policies when disciplining or taking action against the plaintiff, this raises questions on the issue pretext).

In light of the above, there are genuine issues of material fact regarding the illegitimacy of GTE's stated reasons (or lack thereof) for its adverse actions against Wall, and whether Wall was victim of unlawful discrimination and retaliation. Not only is GTE's conduct with respect to Wall a violation of the ADA, but GTE also has serious credibility problems. Furthermore, GTE failed to meet its burden of establishing a legitimate non-discriminatory reason for its refusal to accommodate Wall and Wall's removal from light duty.[18] Regardless of the district court's characterization of Wall's summary judgment evidence as "scanty", the evidence established material fact issues upon which a reasonable jury could have found in Wall's favor. Therefore, the case should properly have been left for a factfinder. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986).

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[18] It has been held that "legitimacy" connotes more than a requirement that the asserted reason have some factual basis, but it must be "reasonable" under the circumstances. *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. 792. "Nondiscriminatory" suggests that the reason or rule invoked by the employer to justify its action must be equally applied. The mere articulation of an explanation for a defendant's action is of no legal force unless it meets the further conditions of clarity and specificity set forth above.

7. A reasonable jury could have found in Petitioner's favor based on the summary judgment evidence regarding his Tex. Lab. Code Ann. § 21.001 (West Supp. 1995) claim; therefore, summary judgment was not proper.

The district court granted summary judgment on Wall's discrimination claim brought under the TCHRA on the ground that Wall failed to show that he was able to perform his CSS job despite his disability. (ROA 393). In making this ruling, the court relied on the same reasoning used in its analysis of Wall's ADA discrimination claim. (ROA 393).

The district court found that Wall's disability prevented him from reasonably performing his CSS job, and that consequently his TCHRA claim must fail. (ROA 393). Under the TCHRA, a discrimination case, such as Wall's, brought "because of disability" or "on the basis of disability" refers to:

> discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

Tex. Lab. Code Ann. § 21.105 (West Supp. 1995). The court in *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328 (S.D.Tex. 1987) construed the above language of the TCHRA to be similar to the "otherwise qualified" requirement of Section 504 of the Rehabilitation Act of 1973. *Id.* at 1346. As previously discussed in this petition (pp. 11-12), there are sharp fact disputes regarding whether Wall is able to perform the essential functions of his CSS job. The district court characterized Wall's summary judgment evidence as "scanty"; however, in light of

the material fact issues established by the evidence such a determination should have been left for the fact finder to determine. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986).

8. **A reasonable jury could have found in Petitioner's favor based on the summary judgment evidence regarding his Tex. Lab. Code Ann. § 451.001 (West Supp. 1995) claim; therefore summary judgment was not proper.**

The district court granted summary judgment on Wall's claim brought pursuant to Tex. Lab. Code Ann. § 451.001 (West Supp. 1995)[19] reasoning that Wall's summary judgment evidence was scanty and failed to establish a causal connection between his workers' compensation claim and GTE's adverse employment actions. (ROA 395). The Fifth Circuit affirmed despite overwhelming evidence upon which a reasonable jury could have found in favor of Wall.

To maintain a cause of action under § 451.001, the plaintiff need only establish a causal connection between his workers' compensation proceeding and his termination. *Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1090 (5th Cir. 1991); *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 522 (Tex. App. – Corpus Christi 1993, writ dism. agr.). An employee need not prove that the claim for workers'

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[19] Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1992) was repealed and recodified in Sections 451.001-.003 of the Texas Labor Code. This recodification did not change the substantive law.

compensation benefits was the sole basis for the termination. *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App. – El Paso 1986) *aff'd*, 734 S.W.2d 667 (Tex. 1987). The employer must rebut by showing a legitimate reason for the discharge; however, the employee may still recover damages if retaliation was a factor. *See, Jones v. Roadway Exp., Inc.*, 931 F.2d at 1090.

Courts have found the following factors, all of which are evidenced in this case, supportive of the existence of a causal link: **(a) Knowledge of the claim by those making the decision to discharge.** *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d at 658; *Parham v. Carrier Corp.*, 9 F.3d 383 (5th Cir. 1993). See, ROA 70, 207); **(b) Negative comments were made by the employer regarding the workers' compensation claim.** *General Electric v. Kunze*, 747 S.W.2d 826 and **(c) Expression of a negative attitude toward the plaintiff's injured condition.** *Paragon Hotel Corp. v. Ramirez*. Wall's former supervisor David Debusman, openly harassed and ridiculed Wall for filing workers' compensation claims. (ROA 262, 263-66, 270-75, 279-80, 281-82). Among other things, Debusman stated that Wall was faking his on-the-job injuries and that his injuries were "bulls___t". (ROA 263-66, 270-75, 281-82)[20]; Debusman's negative attitude was no doubt fueled by the fact that his future pay raises were determined based on the number

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[20] Debusman had been transferred to another department prior to Wall's return to work; however, Debusman's discriminatory conduct was blatant and continuous. When an employee's unlawful conduct is continuous and pervasive, then the employer is deemed to have had constructive knowledge of the discriminatory conduct. *See, Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994).

of workers' compensation injuries in his department. (ROA 279); **(d) Discriminatory treatment of the Plaintiff after being released to return to work by the doctor.** *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d at 658. GTE failed to accommodate Wall with respect to his CSS job.(ROA 209, 251-52); **(f) Inconsistent and contradictory statements by defendants.** *Investment Properties Management v. Montes*, 821 S.W.2d at 695-696. GTE has serious credibility problems with respect to Wall's removal from the workplace. (ROA 70, 207, 252-53).

Although the district court concluded Wall's evidence was "scanty," in light of the ample evidence of the "causal connection" such a determination should have been left for the fact finder to determine. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986). The Fifth Circuit erred in affirming summary judgment in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10612

MICHAEL R. WALL,

Plaintiff-Appellant,

versus

GTE SOUTHWEST INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(3:93-CV-1546-H)

(Filed May 8, 1995)

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.*

PER CURIAM:

Affirmed. *See* Fifth Circuit Rule 47.6.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL R. WALL,	*	
	*	
Plaintiff	*	Civil No.
v.	*	3:93-CV-1546-H
	*	
GTE SOUTHWEST INCORPORATED,	*	
	*	
Defendant	*	

MEMORANDUM OPINION AND ORDER

(Filed May 31, 1994)

Before the Court are the following: Defendant's Motion for Dismissal or Summary Judgment with Supporting Brief, filed February 18, 1994; Plaintiff's Response and Opposition, filed March 17, 1994; and Defendant's Reply, filed April 1, 1994.

I. BACKGROUND

Plaintiff Wall began working for Defendant GTE as a Customer Service Specialist (CSS) on September 13, 1982. Plaintiff was an hourly employee and a member of the collective bargaining unit represented by Local 6171 of the Communications Workers of America. As a CSS, Wall traveled to Defendant's customers' locations to perform installations and repairs of telephones, aerial telephone

cables, and buried telephone cables. Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh. 2.

Plaintiff was working out of Defendant's Plano facility when he injured his back on the job on March 6, 1992. Plaintiff's Response, Affidavit of Michael R. Wall ("Wall Aff."), Pl. Exh. A; Defendants' Motion, Declaration of Douglas Patton ("Patton Decl."), Def. Exh. 2. On March 11, 1992, an incident report was filed which noted that Plaintiff had previously been diagnosed with a bulging disc in his lower back. Patton Decl., Def. Exh. 2 and attachment B. Plaintiff began to receive workers' compensation benefits on March 13, 1992. Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh. 2 and attachment C.

On May 26, 1992, David Debusman, who had been Plaintiff's supervisor at Defendant's Plano facility, was transferred to a different department. After the transfer, Debusman had no supervisory authority over Plaintiff. Defendant's Reply, Declaration of Terry Lumpkin ("Lumpkin Decl."), Def. Exh. B. Sometime in May or June of 1992, union representatives filed a grievance alleging that Debusman had discriminated against Plaintiff. The grievance on Plaintiff's behalf was taken through the second step and was dismissed at the third step; it never went to final arbitration. Wall Aff., Pl. Exh. A.

Plaintiff returned to work in Defendant's Plano office on July 24, 1992 under "permanent restrictions" that his doctor had ordered. Plaintiff was allowed to work for four hours per day, with significant limits on lifting, carrying, pivoting at the waist, reaching, sitting, and

standing.[1] Wall Aff. Pl. Exh. A; Patton Decl., Def. Exh. 2 and attachment D; Declaration of Gina Logan ("Logan Decl."), Def. Exh. 1 ¶ 2 and attachment A. When he received the partial release from his doctor, Plaintiff assumed that he would be able to return to his job as a CSS, albeit in a restricted capacity. It was Plaintiff's understanding that his doctor would reevaluate the restrictions two weeks later, based on Plaintiff's experience as a part-time CSS. Wall Aff., Pl. Exh. A.

However, instead of resuming his CSS job, Plaintiff performed light duty work for Defendant GTE from July 24, 1992 to September 17, 1992. Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh. 2. Three other GTE employees also had light duty assignments in the Plano office during this period: James Chlebowski, Bo Ellerbee, and Robert Grimes. Patton Decl., Def. Exh. 2; Logan Decl., Def. Exh. 1 ¶ 2. On August 12, 1992, Defendant received a second report from Plaintiff's doctor that confirmed Plaintiff's physical restrictions and again limited him to four hours of work per day. Logan Decl., Def. Exh. 1 ¶ 3 and attachment B.

On September 17, 1992, Plaintiff was told to leave work and return to workers' compensation status. Another employee, Robert Grimes, was also taken off

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[1] According to Plaintiff, he was released to work "on a trial basis working approximately 4 hours/day with some various physical restrictions, i.e., occasional lifting of 58 lbs. from floor to knuckle; occasional lifting of 48 lbs. from knuckle to shoulder; occasional lifting of 38 lbs. from shoulder to overhead; no carrying over 35 lbs; no waist pivot with over 55 lbs.; no sitting over 4 hours; no standing over 10 minutes; walking was unlimited and I was permitted to climb and crawl." Wall Aff., Pl. Exh. A.

light duty work on that date. Defendant GTE maintains that there was not enough light duty work to occupy four employees, and that it retained the two most senior employees, Bo Ellerbee and James Chlebowski, in conformity with the terms of the collective bargaining agreement then in force. Patton Decl., Def. Exh. 2 and attachment A; Logan Decl, Def. Exh. 1¶ 4. Douglas Patton, Defendant GTE's Regional Administrator for Labor Relations, attests that the August 16, 1992 Agreement of Recognition, Bargaining Procedure, and Operating Contract between Defendant GTE and Communications Workers of America ("the collective bargaining agreement") controlled the terms and conditions of Plaintiff's employment at that time. Patton Decl., Def. Exh. 2 ¶ 2 and attached Exh. A.

On September 18, 1992, Plaintiff contacted one of Defendant's employees and asked when he could get back to work. Gina Logan, who was a Facilities Supervisor – Installation and Maintenance at the time, reports that Plaintiff sought her advice, and that she told him he needed a full medical release to return to full duty. Logan Decl., Def. Exh. 1 ¶ 5. However, Plaintiff maintains that he spoke with acting supervisor and union steward Barbara Hanson, rather than Logan, about Defendant's insistence on a full medical release. Wall Aff., Pl. Exh. A. In any event, Plaintiff never submitted such a release, and Plaintiff remains under permanent restrictions. *Id.;* Logan Decl., Def. Exh. 1 ¶ 5.

On September 18, 1992, Plaintiff filed charges of discrimination with the EEOC, alleging that Defendant GTE had removed him from light duty because of his age and

in retaliation for filing a previous charge of discrimination and had thus violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and the Age Discrimination in employment Act of 1967 ("ADEA"). Plaintiff also alleged that Defendant GTE had failed to accommodate his disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (West Supp. 1994). Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh 2 and attachment E.

According to Gina Logan, Plaintiff moved to Angleton, Texas sometime in the fall of 1992 but did not officially inform Defendant of his relocation. Logan states that she had to ask a co-worker to determine Plaintiff's whereabouts. Logan Decl., Def. Exh. 1 ¶ 5. Plaintiff maintains that he informed Logan of his move; he also notes that he received supplementary benefits checks from Defendant at his Angleton address. Wall Aff., Pl. Exh. A. Plaintiff never responded to Defendant's June 14, 1993 letter confirming that his benefits had expired and inquiring whether he desired to return to work, resign, or take a voluntary six-month leave of absence. Declaration of M.F. Fannin ("Fannin Decl."), Def. Exh. 3 ¶ 2 and attachment A.

Plaintiff filed suit against Defendant on June 25, 1993 in the 162nd Judicial District of Dallas County, Texas. *See* Original Petition. Contending that Plaintiff's claims were governed by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (West Supp. 1994), Defendant removed the case to this Court on July 30, 1993. *See* Notice of Removal.

On August 12, 1993, Defendant sent Plaintiff a follow-up letter, which clarified that Defendant would regard failure to contact a supervisor by August 27, 1993 as Plaintiff's election to leave employment. Fannin Decl., Def. Exh. 3 ¶ 2 and attachment B. In a letter dated August 12, 1993, counsel for Plaintiff warned Defendant that Plaintiff had filed charges with the EEOC and that "this could only constitute further retaliation for having asserted his rights as provided by law." Fannin Decl., Def. Exh 3 ¶ 2 and attachment C.

Plaintiff's First Amended Original Complaint, filed February 15, 1994, seeks redress of violations of the ADA, the Texas Commission on Human Rights Act ("TCHRA"), Tex. Rev. Civ. Stat. Ann art. § 5221k (West Supp. 1993),[2] and the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. § 8307c (West Supp. 1993).[3] Plaintiff alleges that Defendant discriminated against him by terminating him, by discriminating against him in the terms, conditions, and privileges of his employment, and by failing to accommodate his disability. First Amended Original Complaint ¶ 5. Plaintiff alleges that he filed timely

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[2] Section 5221k has been repealed and recodified with amendments as Tex. Labor Code Ann. § 21.001 *et seq.* (West Supp. 1994). However, the repealing act has no effect on complaints filed with the Texas Commission on Human Rights before September 1, 1993. Act of May 24, 1993, 73rd Leg., ch. 276, § 9.

[3] The Court notes that Tex. Rev. Civ. Stat. Ann. art. 8307c (West Supp. 1993) was repealed and recodified in the Texas Labor Code, 1993, 73rd Leg., ch. 269, § 1, effective September 1, 1993. Sections 451.001-.003 of Tex. Labor Code Ann. (West Supp. 1994) contain the provisions of article 8307c and do not alter the substantive law.

charges of discrimination and disability with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights, and that he thereafter received notice of his right to sue. First Amended Original Complaint ¶ 6; Wall Aff., Pl. Exh. A, attached Exh. 1, dated March 4, 1994. Plaintiff seeks a permanent injunction, a declaratory judgment, backpay, frontpay, damages, exemplary damages, attorneys' fees and costs, and other relief. First Amended Original Complaint ¶ 8.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. The threshold inquiry, therefore, is "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the nonmovant's case. *See Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.), *cert. denied*, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992).

Once the moving party shows that it is entitled to summary judgment, the burden shifts to the nonmoving party to "come forward with 'specific facts showing that

there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Rule 56(e)); *see also Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195-98 (5th Cir. 1986). A party must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Stated another way, "[i]f the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (citing Matsushita, 475 U.S. at 587). However, all of the evidence must be viewed in the light most favorable to the motion's opponent. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

B. Defendant's Motion for Dismissal or Summary Judgment

Plaintiff complains of discriminatory treatment and discharge in violation of the Texas Commission on Human Rights Act ("TCHRA"), Tex. Rev. Civ. Stat. Ann. art. 5221k (West Supp. 1993)[4] and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (West Supp. 1994). Plaintiff also asserts a claim for retaliation under article 8307c of the Texas Workers' Compensation Act[5] and possibly under the ADA as well.

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[4] *See* note 2 *supra*.

[5] *See* note 3 *supra*.

Defendant's Motion for Summary Judgment attacks Plaintiff's claims in two main ways. First, Defendant argues that Plaintiff's claims are preempted by § 301 of the Labor Management Relations Act because evaluating them will require analysis of the terms of the August 16, 1992 collective bargaining agreement. Defendant's Motion at 4-11. Second, Defendant contends that Plaintiff has failed either to state a claim or to meet his summary judgment burden of raising a fact issue regarding essential elements of his claims under article 8307c, the ADA, and the TCHRA. Defendant's Motion at 12-14; Defendant's Reply at 8-10.

1. Satisfaction of Statutory Prerequisites

In its Motion, Defendant also asserts that Plaintiff has not satisfied statutory prerequisites to suit under the ADA or the TCHRA. Defendant's Motion at 12. However, a Notice of Right to Sue regarding Plaintiff's discrimination claims issued on March 4, 1994. Wall Aff., Exh. A, attached Exh. 1. It appears to the Court that Plaintiff has satisfied the statutory prerequisites to suit under 42 U.S.C. § 12117(a) and 42 U.S.C. § 2000e-5(f)(1). *See Pinkard v. Pullman-Standard, Div. of Pullman, Inc.*, 678 F.2d 1211, 1215 (5th Cir. 1982) (holding that right-to-sue letter is condition precedent, which can be fulfilled after filing suit), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729 (1983); *see also James v. Texas Dept. of Human Services*, 818 F. Supp. 987, 990 (N.D. Tex. 1993).

2. Preemption by Section 301 of the LMRA

Defendant asserts that the LMRA preempts Plaintiff's state law claims. Fifth Circuit precedent dictates that, in typical cases, Section 301 of the LMRA will not preempt state law claims of retaliation or discrimination. *Compare Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S.Ct. 1877, 1883 (1988) (holding that Section 301 of LMRA only preempted state law claims if their resolution required interpretation of terms of collective bargaining agreement) *and Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1089-92 (5th Cir. 1991) (holding that claims of retaliatory discharge arose under the Texas Workers' Compensation Act and were not preempted by federal law) *with Medrano v. Excel Corp.*, 985 F.2d 230 (5th Cir.), *cert. denied*, 114 S.Ct. 79 (1993) (holding that case was not "typical straightforward case" alleging discriminatory discharge because it directly challenged legality of settlement provision of collective bargaining agreement, thus warranting preemption by Section 301 of LMRA) *and Martin v. District No. 1 -- Marine Engineers' Beneficial Assoc. / Nat'l. Maritime Union*, 1994 WL 34044 (E.D. La. 1994) (holding that discrimination claims in atypical case directly challenged provisions of collective bargaining agreement and were preempted by Section 301.)

Defendant has not persuaded the Court that Plaintiff's state law claims in this case are atypical enough to warrant LMRA preemption. While Defendant's decision to remove Plaintiff from light duty may implicate the seniority provisions of the collective bargaining agreement to some degree, Plaintiff's arguments encompass

other actions that stand apart from the collective bargaining agreement, most notably Defendant's refusal to allow Plaintiff to return to his Customer Services Specialist position and Plaintiff's alleged termination. The Court will assess the merits of Plaintiff's claims by summary judgment standards.

3. Retaliation

Plaintiff appears to present claims of retaliation discharge under both state and federal law. The insufficiency of Plaintiff's evidence has led the Court to conclude that summary judgment must be granted to Defendant on Plaintiff's retaliation claims, whether they are brought under article 8307c of the Texas Workers' Compensation Act (now Tex. Labor Code Ann. § 451.001-.003) or under the retaliation provisions of the ADA.

Under the former article 8307c, a plaintiff alleging retaliation has the burden of establishing a causal link between his discharge and his claim for workers' compensation. Then the employer must show that it had a legitimate, non-discriminatory reason to discharge the plaintiff. *See Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1090 (5th Cir. 1991).

Plaintiff contends that his assertion of a workers' compensation claim resulted in discriminatory treatment. Wall Aff., Pl. Exh. A. Other than his subjective belief, however, Plaintiff offers nothing material in support of this assertion. Plaintiff's evidence regarding his alleged mistreatment by a former supervisor, David Debusman, is simply not relevant to claims involving Plaintiff's July

24, 1992 light duty assignment, September 17, 1992 return to workers' compensation, or August 27, 1993 deadline for contacting Defendant GTE. As of May 26, 1992, Debusman transferred to a different department within GTE, where he no longer had supervisory authority over Plaintiff. Debusman played no role in the complained-of employment decisions. *See* Defendants' Reply at 8-9; Lumpkin Decl. ¶ 6. The declarations of Keith Erwin, Donald E. Ingram, and John D. McBride concern Debusman's animus toward Plaintiff, which was allegedly related to his back injury. These declarants' perceptions lack relevance to employment decisions that did not involve Debusman; they also appear to rely in part on matters outside the declarants' personal knowledge. *See* Response attachments 5, 6, and 7.[6] The Declarations of Keith W. Huyck, while based on his personal knowledge of Debusman's statements and actions, are still irrelevant because plaintiff has failed to establish a link between the behavior Huyck describes and Defendant's allegedly retaliatory actions. *See* Response attachments 8 and 9.

Under the ADA, a *prima facie* case of retaliation must include the following elements: a showing that the plaintiff engaged in protected activity; an adverse employment action against employee; and the existence of a causal connection between the protected activity and the

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[6] All three declarations respond to a paragraph of questions supplied by Plaintiff. The Court notes that Erwin's declaration, Response attachment 5, is speculative and not does not recount personal knowledge of specific events. Ingram's "declaration," Response attachment 6, mostly consists of initials approving sentences written by Plaintiff. Portions of McBride's declaration, Response attachment 7, are also speculative.

adverse action. *See Harmer v. Virginia Elec. and Power Co.*, 831 F. Supp. 1300, 1308 (E.D. Va. 1993) (citations omitted). In the ADA context, Plaintiff seems to allege that his employer retaliated against him for filing his EEOC charge, and perhaps for requesting "reasonable accommodation" as well. However, none of the evidence that Plaintiff has submitted shows that a causal connection exists between his actions and Defendant's decisions to assign him to light duty, to return him to workers' compensation status, or to consider him to have abandoned his job after August 27, 1993.[7] Because David Debusman did not exercise authority over Plaintiff in the relevant time period, evidence of Debusman's negative attitude toward Plaintiff is off-point. *See Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 792 (W.D. Okl. 1993) (holding that evidence of derogatory remarks by plaintiff's supervisor was irrelevant when supervisor played no role in employment decisions.)

Because Plaintiff has not presented a *prima facie* case of retaliation, the Court grants summary judgment to Defendant on Plaintiff's retaliation claims.

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[7] Even if Plaintiff had established a *prima facie* case of retaliation, he would not escape summary judgment because he has not adduced evidence to show that Defendant's stated reasons for these decisions were pretexts for discrimination. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2747, 2747-49 (1993); *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958-59 (5th Cir. 1993); *Harmer*, 831 F. Supp. at 1308.

4. Discrimination under the ADA

Plaintiff also asserts an employment discrimination claim under Title I of the ADA. The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. ¶ 12112(a) (West Supp. 1994).

As a first step in an ADA employment discrimination analysis, the Court must determine whether Plaintiff has a "disability" as defined by the statute. Under the ADA, a disability is either a physical or mental impairment that substantially limits one or more of an individual's major life activities, a record of such impairment, or being regarded as having such impairment. 42 U.S.C. § 12101(A)-(C) (West Supp. 1994). The Court has before it evidence showing that Plaintiff's physical impairment has limited his mobility significantly and has restricted him to part-time work. *See* Wall Aff., Pl. Exh. A; *see also* Logan Decl., Def. Exh. 1 and attachments A and B. For the purposes of this summary judgment motion, the Court will assume that Plaintiff is disabled under the ADA.

The second step of the analysis requires the Court to determine whether Plaintiff is a "qualified individual with a disability." The ADA defines such a person as a disabled individual who, with or without reasonable accommodation, can perform the essential functions of his or her position. 42 U.S.C. § 12111(8) (West Supp. 1994). Under applicable regulations and standards, an

individual with a disability is "otherwise qualified" if he or she is qualified for a job except that, because of the disability, reasonable accommodations must be made to allow the person to perform the job's essential functions. 29 C.F.R. app. § 1630.9 (1992).

Plaintiffs have the burden of establishing both that they are disabled and also that they are otherwise qualified. *Chandler v. City of Dallas*, 2 F.2d 1385, 1393-94 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386 (1994) (interpreting the Rehabilitation Act, 29 U.S.C. §§ 701-796, which parallels the ADA in this respect). After assessing the evidence presented by the parties, the Court has concluded that Plaintiff has not shown himself to be "otherwise qualified" for the CSS job.

Plaintiff alleges that Defendant discriminated against him by making him perform light duty work rather than allowing him to return to his CSS position on a part-time, restricted basis. *See* Wall Aff., Pl. Exh. A. However, Defendants' summary judgment evidence sets forth the reasons that Plaintiff was assigned to light duty. Now retired, Gina Logan was working for Defendant in 1992 as a Facilities Supervisor – Installation and Maintenance. She received the July 24, 1992 report from Plaintiff's doctor regarding his restrictions and the updated August 12, 1992 report showing that they would continue. Logan's testimony confirms that, because Plaintiff's restrictions prevented him from performing CSS functions, "he was allowed to perform light duty work." Logan reports that the only light duty work available was "telephoning customers to make sure their service needs had been fulfilled, and logging and tracking other employees' 'down

time' to assist us in analyzing productivity." Logan Decl., Def. Exh. 1 ¶¶ 2-4.

Defendant has presented additional summary judgment evidence detailing the requirements of the CSS position. In his declaration, Terry Lumpkin, a Facility Supervisor – PBX Data for Defendant, attests to the physical and business requirements of the CSS job. His testimony draws on both his previous experience as a CSS and his experience in his current position in the Plano facility. Lumpkin offers detailed explanations of the following essential CSS functions: making repairs that entail standing for "significantly more than ten minutes at a time," either on the ground or on a ladder, regardless of the location of the cable; installing telephone extensions and protectors, which requires the CSS to perform overhead work while standing on a ladder; and frequent lifting of unwieldly equipment, often weighing up to 60 lbs. Lumpkin Decl. ¶¶ 1-3, 5.

Defendant's evidence also clarifies the reasons that Defendant has kept the CSS job as a full-time position. Lumpkin states that, as a regulated telephone service provider, Defendant GTE must comply with stringent response requirements. According to Lumpkin, assignments usually last longer than four hours, and Defendant cannot allow a CSS to leave a job unfinished. Because Defendant must often work within specific time frames to accommodate customer requests, a CSS needs to be available for eight hours of work per day. Lumpkin Decl. ¶ 4.

Both Plaintiff's affidavit and the declaration of Donald E. Ingram, Response attachment 3, present their beliefs that the essential functions of the CSS position

could be modified to fit Plaintiff's limitations.[8] Plaintiff and Ingram suggest that a CSS mostly lifts items weighing less than 60 lbs. and that much of the cable in the Plano area is buried, lessening the amount of time a CSS would need to stand on a ladder. They also assert that, since Defendant's CSS employees occasionally take a half-day of vacation, thus working for four hours, the CSS job can be filled by a part-time worker. Wall Aff., Pl. Exh. A; Ingram Decl., Response attachment 3.

The ADA gives weight to an employer's definition of the essential functions of a job. Section 12111(8) provides that, "[f]or purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential. . . . " 42 U.S.C. § 12111(8). The statute does requires an individual to be able to "perform the essential functions of the employment position." *Id.* The ADA would not obligate Defendant to allow Plaintiff to return to his CSS job if he could not longer perform it adequately. *See Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 788 n.4 (W.D. Okl. 1993) (observing that ADA does not require employers to modify actual duties of specific job in order to make accommodation for individuals who are not physically capable of performing them.) Plaintiff and Ingram seem to agree that plaintiff can perform only a portion of the essential CSS duties, as defined by Defendant. Plaintiff's evidence does not raise a fact issue as to whether reasonably accommodation

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[8] The Court must disregard the statement on this topic made by Keith Erwin in Response attachment 4 because the statement does not conform to the requirements of 28 U.S.C. § 1746.

would enable Plaintiff to satisfy all the requirements of the CSS job.

In a factually similar case, the district court discussed the limits of accommodation under the Rehabilitation Act and noted that an employer was not required to accommodate a disabled individual by "eliminating one of the essential functions of his job." *Florence v. Frank*, 774 F. Supp. 1054, 1061 (N.D. Tex. 1991) (citations omitted). The court observed that, "if the plaintiff's handicap would prevent him from doing the job in question, he cannot be found to be 'otherwise qualified.' " In *Florence*, the court found the plaintiff to be unqualified for the job in question because he could only work four hours of an eight hour job and because his physical limitations prevented him from carrying out a key function -- hand delivery of the mail. *Florence* at 1061-62.

The parties in this case also dispute whether Plaintiff was effectively terminated when he was returned to workers' compensation status on September 17, 1992, or whether Plaintiff abandoned his job by failing to respond to Defendant's letters in the summer of 1993. Plaintiff contends that Defendant effectively fired him when it removed him from light duty, and that disability discrimination prompted his termination. Defendant maintains that Plaintiff's removal from light duty was dictated by the collective bargaining agreement because he was the least senior employee on light duty assignment. As the court in *Florence* observed, "[a]n employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner that would usurp the legitimate rights of their employees in a collective bargaining agreement." *Florence* at 1062.

The Court concludes that Plaintiff has failed to raise a fact issue as to whether he is a "qualified individual with a disability." Because Plaintiff has not satisfied this element of a *prima facie* case of discrimination under the ADA, the Court grants summary judgment to Defendant on this claim.[9]

5. Discrimination under the TCHRA

It is not clear to the Court whether Plaintiff is disabled for purposes of the TCHRA, Tex. Civ. Stat. Ann. art. 5221k § 1.04(b) (West Supp. 1993) (repealed and replaced with Texas Lab. Code § 21.105 (West Supp. 1994), effective Sept. 1, 1993).[10] Even if the Court assumes that he is

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[9] The elements of a *prima facie* case of employment discrimination under the ADA have not yet been clearly articulated by the Fifth Circuit. A few other jurisdictions have determined that, to make out a prima facie case of discriminatory discharge under the ADA, a disabled plaintiff must show that he or she was replaced by nondisabled person. *See, e.g., Sherman v. Optical Imaging Systems, Inc.*, 843 F. Supp. 1168, 1181 (E.D. Mich. 1994); *Jones v. Grindstaff*, 1993 WL 498957 (E.D. Tenn. 1993). The Court notes that Plaintiff has not presented summary judgment evidence showing that a nondisabled individual replaced him.

[10] The Fifth Circuit has construed the TCHRA's standard to be more restrictive than the federal definition of "handicap" under the Rehabilitation Act. *See Chandler*, 2 F.3d at 1397 (interpreting *Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987)). However, the definition of disability in the version of the TCHRA that applies to this case may be broader, in keeping with the federal models. *See Coghlan v. H.J. Heinz and Ore-Ida Foods, Inc.*, 1994 WL 172204 (N.D. Tex. 1994). In any event, the reasoning behind the Court's dismissal of Plaintiff's ADA claim also applies to Plaintiff's TCHRA claim.

disabled under the TCHRA, Plaintiff will not prevail. Art. 5221k § 1.04(b) of the TCHRA only applies to disability that "does not impair an individual's ability to reasonably perform a job." For the reasons explained in the preceding section, the Court concludes that Plaintiff has failed to show that he was able to reasonably perform the CSS job despite his disability. Plaintiff has not established a *prima facie* case of discrimination under the TCHRA, and Defendant is entitled to summary judgment on the claim.

6. Evidence unrelated to claims before the Court

The Court observes that Plaintiff has submitted very little relevant summary judgment evidence in support of his Response and Opposition. Many of the declarations submitted by Plaintiff describe his feelings of frustration and depression, which his family and friends attribute to his dealings with Defendant GTE. *See* Response attachments 10, 11, 12, 13, and 15.[11] But because such testimony does not address any of the legal claims raised by Plaintiff's Response, the Court is obliged to disregard it. The Court has also ignored the portions of Plaintiff's affidavit that criticize union stewards Barbara Hanson and Keith Huyck for not filing grievances on his behalf because they do not relate to claims before the Court. *See* Wall Aff., Pl. Exh. A. The declaration of Sowana Johnson,

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[11] The Court notes that Section 301 of the LMRA preempts state law emotional distress claims that relate to employment discrimination. *See Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 300 (5th Cir. 1994).

which states that Plaintiff is currently seeking employment, is not relevant at the summary judgment stage. *See* Pl. Exh. 14.

III. CONCLUSION

Plaintiff's scanty summary judgment evidence fails to create an issue of material fact regarding either retaliation or discrimination. Defendant's Motion for Summary Judgment is **GRANTED.** Judgment will be entered accordingly.

SO ORDERED.

DATED: May 31, 1994

/s/ Barefoot Sanders
BAREFOOT SANDERS,
Chief Judge
United States
District Court
Northern District
of Texas

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL R. WALL, Plaintiff	*	Civil No. 3:93-CV-1546-H
v.	*	
GTE SOUTHWEST INCORPORATED, Defendant	*	

JUDGMENT

(Filed May 31, 1994)

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, filed May 31, 1994.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Michael R. Wall take nothing by his suit against Defendant GTE Southwest Incorporated, and that this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

SO ORDERED.

SIGNED this 31 day of May, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
Chief Judge
United States
District Court
Northern District
of Texas

APPENDIX D

Fifth Circuit Local Rule 47.6: Affirmance Without Opinion

The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th CIR.R 47.6" or "ENFORCED. See 5th CIR.R 47.6."

(Amended June 17, 1986; Feb., 1987; Oct. 20, 1992; amended effective Jan. 1, 1995.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL R. WALL Plaintiff, v. GTE SOUTHWEST INCORPORATED, Defendant.	)	CIVIL ACTION NO. 3:93-CV1546-H

AFFIDAVIT OF MICHAEL R. WALL

BEFORE ME, the undersigned authority on this day personally appeared Michael R. Wall, who after being duly sworn deposed as follows:

> "My name is Michael R. Wall. I am over the age of 18 years of age, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in this case. I was employed by the Defendant, GTE Southwest, Incorporated until I was terminated.
>
> I began my employment with GTE in September 1982. I was employed as a Customer Service Specialist. As a Customer Service Specialist my duties included: installation and repair of residential and small businesses telephone services. On or about March 6, 1992 I injured my back while I was in the course and scope of my employment with GTE. I was taken off of work by doctor, Dr. Tennell, the first doctor I saw on

my on-the-job back injury. I then began receiving workers' compensation benefits.

After having been off from work as a result of the March 6, 1992 on-the-job injury, I returned to work in approximately July 1992 with permanent restrictions placed on me by my doctor, Dr. Cable. Specifically, I was released to return to work on a trial basis working approximately 4 hours/day with some various physical restrictions, i.e., occasional lifting of 58 lbs. from floor to knuckle; occasional lifting of 48 lbs. from knuckle to shoulder; occasional lifting of 38 lbs. from shoulder to overhead; no carrying over 35 lbs; no waist pivot with over 55 lbs; no sitting over 4 hours; no standing over 10 minutes; walking was unlimited and I was permitted to climb and crawl. I was to follow up with Dr. Cable in two weeks to see how I was adjusting at my Customer Service Specialist job with my restrictions. When I returned to work, I informed Fred Chasak and Pam McClure at GTE of my permanent restrictions.

The weights of objects such as house wire and aerial drop wire and small ladders which I was required to occasionally lift on my job were within these weight restrictions, provided I carried or lifted them within my restrictions. I also had access to the use of an aerial bucket truck which allowed me to avoid having to climb up poles. At the time of my injury I was routed primarily to west and northwest part of Plano, Texas. Based on my experience working in this area, this area as approximately 90% buried cable. Working on buried cable requires no pole climbing and also I would not have to carry the

28 foot ladder. These statements are further supported in Exhibits 3 and 4 attached hereto.

I was regularly employed by GTE as a Customer Service Specialist, but upon my return to work in July 1992, GTE placed me in a light duty position rather than placing me in my former position. After I was placed under the permanent restrictions by Dr. Cable, GTE never gave me the chance or the option to return to my Customer Service Specialist position, either with or without reasonable accommodation. GTE made no effort to make accommodations for my disability so as to assist me in performing my regular job duties.

Under Dr. Cable's various restrictions I could have performed the Customer Service Specialist job with reasonable accommodations and in 4 hour shifts. Based on my past experience working in the Customer Service Specialist position this job could be properly performed in 4 hour increments and in accordance with my doctor's restrictions. It was my understanding from Dr. Cable that I was to return to work on a trial basis and to report back to him to see if my restrictions could be altered or my work days increased based on my progress. It was my understanding from Dr. Cable that since GTE would not let me return to my Customer Service Specialist position on a trial basis that my capacity to work with respect to my Customer Service Specialist position could not be properly and fairly re-evaluated.

On or about September 17, 1992, Fred Chasak informed me and Robert Grimes (another GTE employee on light duty after an on-the-job injury) that there were four people on light duty.

Chasak told Grimes and me that were being taken off from work and placed back on workers' compensation. According to Chasak, he said there is not enough light duty work for four employees and that he was putting me and Robert Grimes back on workers' compensation. Bo Ellerbee and Jim Chlebowski, were the other two employees who had previously been working on light duty with Grimes and me. I have since learned from Jim Chlebowski at GTE that Chlebowski was actually released to return to full duty work on or about September 14, 1992. I was told by Bo Ellerbee, the employee retained for light duty after I was taken off light duty, that he was restricted from performing outside work. Prior to my termination, I saw Chasak and/or Hansen sending Ellerbee on outside jobs such as verifying telephone numbers; taking meter readings at residences; and checking on various problems and speaking with customers. I was not restricted from performing outside jobs. Instead of retaining me to perform these outside jobs, GTE removed me from light duty and worked Ellerbee in violation of his restrictions.

I later called an "in-charge" or acting supervisor Barbara Hansen, who is also a union steward, to see what I would need to do in order to return to work. According to Hanson, Chasak stated that before Grimes and I could return work we would have to receive a full duty release from our doctors or more light duty was available. Hanson told me she was sorry about this. Contrary to Gina Logan's declaration, I did not speak to Gina Logan on this issue, I spoke to Hanson. I also spoke to Keith Huych, a Union Steward, on September 17, 1992 after Chasak

had said Grimes and I could no longer work and he told me he did no know what he could do for us and that Grimes and I should go ahead and follow through with your attorneys. Neither Hansen or Huych filed grievance on my behalf after I was taken off light duty and told not to return to work.

Steve Sanford was brought in to work light duty after I was taken off light duty. I was told this by Don Ingram or Keith Irwin, a Customer Service Specialist at GTE. I was not contacted by GTE to fill this light duty position that was given to Sanford.

I was thus terminated because GTE was aware that I would never get a full release, as the disability and restrictions placed on me by my doctor were permanent. I did not abandon my job with GTE.

Contrary to Gina Logan's declaration, prior to moving to Angleton, Texas I notified Gina Logan that I was moving. In fact, prior to my move, Gina Logan told me that since I could not work GTE in Plano and since I was moving I should try and bid on some jobs in the Stafford league City area which was close to the Angleton area. I also had a forwarding number on my phone. Also, I timely received my supplementary benefits check from GTE at my address in Angleton.

I am currently still under permanent restrictions by my doctors, Dr. Zweighaft and Dr. Sadeghpour.

Since my termination from employment at GTE I have sought employment at numerous places such as: Brazoria County Sheriff's Department;

the Post Office in Angleton, Texas and the Texas Department of Corrections in Huntsville. Exhibit 15 attached hereto supports the fact that I have been looking for work through SER Jobs for Progress. Despite my efforts, I have been unable to find a job. Because of my back injury and my restrictions, I am limited in the types of work I can perform. I have to constantly be aware of my back condition and have to be cautious about the work I perform so as not to further aggravate my injury. I am restricted from standing for a long period of time, and I am restricted in my ability to reach, push and pull.

The union had filed grievance on my behalf in approximately May or June of 1992 regarding discriminatory treatment I was receiving from David Debussman, my supervisor at the time, after I was injured on the job. This grievance was taken through the second step, and I had it dismissed at the third step. This grievance never went to final arbitration.

I presented my discrimination claims to the EEOC and received a notice of right to sue on each of these claims.

Attached hereto as Exhibit 1, is a true and correct copy of the "Notice of Right to Sue" I received regarding my charge of disability discrimination.

Attached hereto as Exhibit 2, is a true and correct copy of the "Notice of Right to Sue" I received regarding my charge of race and age discrimination.

I was discriminated against and terminated based on my disability and in retaliation for

having pursued benefits under the Texas Workers' Compensation Act. As a result, I have suffered extreme mental anguish and have been harmed beyond reproach. I was not even given a chance to prove myself an able worker after I was released to return to work after my on-the-job injury. Instead GTE made me feel worthless by placing on light duty and then later taking even that away. I suffered mental anguish over they way GTE treated me to the point that I became severely depressed and had to seek psychiatric treatment. The pain GTE has put me through has been excruciating and unrelenting. These facts are additionally supported in Exhibits 10, 11, 12 and 13 attached hereto. GTE harmed me unmercifully by unlawfully terminating me and refusing to accommodate my disability, and in doing so acted knowingly, willfully and with malice.

Further Affiant Sayeth Not.

/s/ Michael R. Wall
Michael R. Wall

SUBSCRIBED AND SWORN TO BEFORE ME on this 17th day of March, 1994.

/s/Marie Yvette Booth
Notary Public

(Seal)

MARIE YVETTE BOOTH
MY COMMISSION EXPIRES
August 19, 1997

APPENDIX F

DECLARATION OF DOUGLAS PATTON

My name is Douglas Patton, I am of sound mind, capable of making this Declaration, and am personally acquainted with the facts herein stated:

1. Currently, I am employed by GTE Southwest Incorporated in the position of Regional Administrator – Labor Relations, and I was, and continue to be familiar with the facts and records related to the status of Michael R. Wall with the company. I have served a total of eight years with the company. I have personal knowledge of the facts set forth in this Declaration, and they are true and correct. I am familiar with the records attached to my Declaration as Exhibits "A" through "D". The records are exact duplicates of documents from the business records of GTE Southwest Incorporated. They were kept by GTE Southwest in the regular course of business, and it was the regular course of business of GTE Southwest for an employee or representative of GTE Southwest with knowledge of the act, event, opinion, condition or diagnosis recorded to make the record or to transmit information to be included in the record. The records were made at or near the time or reasonably soon thereafter.

2. Michael Wall began his employment with GTE Southwest on September 13, 1982 as a Customer Service Specialist. Customer Service Specialists travel to GTE customer locations and perform installation and repair work on telephones and telephone cables, both aerial and buried. He has always been an hourly employee and a member of the bargaining unit represented by Communications Workers of America Local 6171. The terms and

conditions of his employment after August 16, 1992 were governed by the Agreement of Recognition, Bargaining Procedure and Operating Contract between GTE Southwest Incorporated and Communications Workers of America dated August 16, 1992. A true and correct copy of the Agreement is attached to this Declaration as Exhibit "A." The Agreement does not make provision for "light duty" work, but gives the company the right to determine the size of the work force. See Article XXVI, Section 2.1, page 93 of the Agreement. Consistently, GTE Southwest Incorporated follows a policy of permitting employees to work light duty work on occasion, upon request, but reserves its right to grant or deny light duty work within its own discretion. The Agreement also provides that decisions regarding the assignment of hours, among other things, shall be decided based upon seniority, in combination with the ability of the employee and the conditions of the business. See Article XVI, Section 2.1, page 64. The Agreement also provides that GTE has the right to schedule all tours and sessions of hourly employees. See Article X, Section 5.1, p. 26.

3. I have reviewed Wall's employment records. The records indicate that he reported a back injury on March 11, 1992 that had occurred on March 6, 1992. Exhibit "B" to my Declaration is a true and correct copy of the incident report. He was off work and on workers' compensation beginning March 13, 1992 until he was released to perform restricted duties on a half-day basis on July 24, 1992. Exhibits "C" and "D" to my Declaration are true and correct copies of the workers' compensation report and the medical statement pertaining to his partial

release. He performed light duty work during the summer of 1992 until September 17, 1992, when he was told to leave work and continue to receive whatever benefits he was entitled to under workers' compensation and/or GTE accident disability, along with a co-worker, Robert Grimes. Grimes and Wall were two of four employees performing light duty work at the time. The other two employees were Bo Ellerbee and James Chlebowski. The respective seniority dates of the four employees were as follows:

Name	First Day of Employment with GTE
Bo Ellerbee	9/8/81
James Chlebowski	12/14/81
Michael Wall	9/13/82
Robert Grimes	8/22/83

Wall did not file a grievance related to being returned to workers' compensation status in September of 1992.

4. GTE Southwest was also provided a copy of Wall's EEOC Charge, which indicates that it was filed on September 18, 1992. A true and correct copy of the Notice of Charge is attached to my Declaration as Exhibit "E." This is the only EEOC charge filed by Wall referencing discrimination due to disability.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON February 18, 1994.

/s/ Douglas Patton
DOUGLAS PATTON

APPENDIX G

DECLARATION OF GINA LOGAN

My name is Gina Logan, I am of sound mind, capable of making this Declaration, and personally acquainted with the facts herein stated:

1. Currently, I am retired from my employment with GTE Southwest Incorporated. I served a total of 20.5 years with the company. In 1992, I was employed by GTE Southwest Incorporated ("GTE") in the position of Facilities Supervisor – Installation and Maintenance. I had direct supervisory responsibility for Michael Wall for a period of time while he was employed by GTE as a Customer Service Specialist. I have personal knowledge of the facts set forth in this Declaration, and they are true and correct. I am familiar with the records attached to my Declaration as Exhibits "A" and "B." The records are exact duplicates of documents from the business records of GTE Southwest Incorporated. The records were kept by GTE Southwest in the regular course of business, and it was the regular course of business of GTE Southwest for an employee or representative of GTE Southwest with knowledge of the act, event, opinion, condition or diagnosis recorded to make the records or to transmit information to be included in the records. The records were made at or near the time or reasonably soon thereafter.

2. Although Michael Wall had been off work due to a back problem, on July 24, 1992, he was released to return to half-day duty, with physical restrictions, by Dr. James Cable. Exhibit "A." Since the restrictions imposed by Dr. Cable did not allow Mr. Wall to perform all the functions of a Customer Service Specialist, and indicated

that he was only to work half-days, he was allowed to perform light duty work. Customer Service Specialists perform their duties on a full-day, eight hour basis. The only "light duty" work available was telephoning customers to make sure their service needs had been fulfilled, and logging and tracking other employees' "down" time to assist us in analyzing productivity.

3. On August 12, 1992, we received another statement from Dr. Cable indicating that Mr. Wall's restrictions would continue, and not releasing him for anything more than half-day work. Exhibit "C."

4. During this time period, there were a total of four men performing "light duty" work in the Plano office. The four men were Robert Grimes, Michael Wall, James Chlebowski and Bo Ellerbee. There just wasn't enough work to keep them all busy, or to justify keeping all of them working light duty. Accordingly, two of the men were put back out on workers' comp. Of the four, the two least senior were Michael Wall and his co-worker, Robert Grimes. On September 17, 1992, Mr. Grimes and Mr. Wall were notified that they would no longer be allowed to perform "light duty." Mr. Wall, to my knowledge, returned to workers' comp status.

5. On September 18, 1992, Mr. Wall contacted me and asked when he could return to work. I told him that he would need to get a full medical release in order for him to return to full duty. To my knowledge, Mr. Wall moved to Angleton, Texas, near Houston shortly after he was placed back out on comp. He did not notify us of his move; I had to find out where he was from a co-worker. He never submitted a medical release to return to work.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON Feb. 18, 1994.

/s/ Gina Logan
GINA LOGAN

APPENDIX H

DECLARATION OF DONALD E. INGRAM

My name is Donald E. Ingram I am over eighteen years of age have never been convicted of a felony and am in all respects competent to make this affidavit. I have personal knowledge of each of the facts and opinion stated herein. I declare under the penalty of perjury that the statement contained here in are true and correct.

EXECUTED this day of 03-15 1994.

/s/ Donald E. Ingram
NAME

A BOX OF HOUSE WIRE WEIGHS 17 LBS. AND A BOX OF AERIAL DROP WIRE WEIGHS 33 LBS. AND A 28 FT. LADDER WEIGHS BETWEEN 50-55 LBS. I ALSO CONCUR WITH THE FACT THAT 75% OF OUR PLANT IS BURIED. GTE HAS A SYSTEM THAT DEPLOYS ITS EMPLOYEES TO CERTAIN AREAS. I ALSO RECALL THAT ME AND MIKE WALL WERE DEPLOYED IN THE WEST SIDE OF PLANO, WHICH HAS 90% BURIED PLANT. I HAVE BEEN DEPLOYED ON THE EAST SIDE OF PLANO WHICH HAS BURIED AND AERIAL PLANT AND ON OCCASION HAVE REQUIRED THE USE OF A BUCKET TRUCK. I HAVE ON OCCASION WORKED FOUR HRS AND TAKEN 4 HRS. OFF FOR EIGHTER PERSONAL TIME OR VACATION TIME. THIS IS A COMPANY POLICY PRESENTLY.

APPENDIX I

DECLARATION OF TERRY LUMPKIN

My name is Terry Lumpkin. I am over the age of 21 years and am competent to make this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

1. I am currently employed by GTE Southwest Incorporated. I have been with the company for 20 years. My title is Facility Supervisor – PBX/Data, and I work in the Plano facility where Michael Wall worked. I did the same job as Michael Wall for four years, and have performed the essential functions of that job. I am well aware of the physical requirements of the job, as well as of the business requirements.

2. If a CSS were restricted to standing for only ten minutes at a time, he or she could not perform the job. No matter whether a CSS is working in an aerial or a buried area, he or she must stand, both on the ground, and on a ladder, for significantly more than ten minutes at a time. For example, on a typical assignment, a CSS will drive to a cross-connect box and stand in front of it for anywhere from 5 to 30 minutes or more, while he or she performs tasks or waits for information from other GTE departments. Then, the CSS will go to the house or business involved, and spend the rest of the time there, which typically runs from one to two hours, standing.

3. As another example, if a customer requests that a telephone extention be installed, a CSS may have to run external wiring up under the eaves of the roof. Regardless of whether the house is one or two stories tall, this

job requires either a four-foot, seven-foot, or taller ladder. Because it is difficult to work at eye level with the eaves, a CSS usually positions the ladder so that he or she can stand just under the area to be worked on, and will work overhead while standing on the ladder. This job cannot be performed if the CSS continually has to climb down off the ladder every ten minutes to rest. CSS's frequently have to install protectors on the outside of houses and buildings. By GTE policy, these are installed five feet off the ground -- again, standing for much longer than ten minutes is required.

4. The CSS job cannot be reasonably performed in four hours, either. GTE is a regulated telephone service provider. It is required to make a commitment to a customer who cannot receive or send calls that the service will be working within 24 hours of the time it is reported. GTE CSS's never leave a job unfinished as a matter of policy. Once a CSS is dispatched to a job, no matter how much overtime is required, he or she must stay until it is done. A CSS working only four hours would have to be continually relieved by another CSS in order to get work completed. Yes, there might be an occasion where one or two jobs might be completed within a four-hour period, but it would not be very frequent. The only other option would be for the restricted CSS to finish a long job in the beginning of the shift, and then simply do no more work for the rest of the shift. This would not constitute performing the CSS job, and is certainly not reasonable. A further complicating factor is the fact that many customers demand that work be started and completed between specific time periods, particularly when they are staying home from work in order to meet the CSS at their

home. A four-hour CSS shift does not provide the vital flexibility needed for the job.

5. Finally, the weight requirements of the CSS job, which include frequent lifting of up to 60 pounds, are essential. Even the four- and seven-foot ladders are heavy, and their awkward shape, particularly when extended, make them much harder to work with than simply their dead weight would suggest. Every CSS needs to be able to handle a long extension ladder as well. There is no way to guarantee that a job, even in an area with a lot of buried cable, will not include aerial work, or require a long ladder to reach a second story.

6. On May 26, 1992, David Debusman, who was Michael Wall's supervisor, stopped working at the Plano facility and transferred to a completely different department within GTE Southwest. After his departure in May, he had no further supervisory authority over Michael Wall, nor did he take or attempt to take any action with regard to Michael Wall.

7. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date: March 31, 1994 /s/ Terry Lumpkin
Terry Lumpkin

APPENDIX J

42 U.S.C. § 12102(a)-(c) (West Supp. 1995):

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111(8) (West Supp. 1995):

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(9)(B) (West Supp. 1995):

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112(a) (West Supp. 1995):

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(b)(5) (West Supp. 1995):

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an

applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

42 U.S.C. § 12117(b) (West Supp. 1995):

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the

Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] not later than 18 months after July 26, 1990.

Supreme Court U.S.
FILED
SEP 8 1995
CLERK

No. 95-225

In The

Supreme Court of the United States

October Term, 1995

MICHAEL R. WALL,

Petitioner,

v.

GTE SOUTHWEST INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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LIST OF PARTIES

In addition to the interested parties listed in Petitioner's Brief, the following parties are interested in this action:

1. William G. Mundy, Counsel of Record for Respondent before the Supreme Court of the United States
2. GTE Corporation, parent company of Respondent GTE Southwest Incorporated
3. GTSW Holding, Inc., subsidiary of Respondent GTE Southwest Incorporated
4. GTE Intech, Inc., subsidiary of Respondent GTE Southwest Incorporated

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STATEMENT OF THE CASE

This is a summary judgment case. Petitioner Michael Wall ("Wall"), a GTE Customer Service Specialist ("CSS"), sued his employer, Respondent GTE Southwest Incorporated ("GTE Southwest") in the 162nd Judicial District Court, Dallas County, Texas. GTE Southwest removed the case to the Northern District of Texas, asserting that Wall's claims were preempted by federal labor law. Wall did not file a motion to remand.

In his lawsuit, Wall asserted a claim of employment discrimination (because of an alleged disability) under the Texas Commission on Human Rights Act ("TCHRA"), formerly Tex. Rev. Civ. Stat. Ann. art. 5221k, § 1.01, *et seq.* (Vernon 1987); now § 21.051 *et seq.*, Texas Labor Code (Vernon Supp. 1995), and under the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101 *et seq.* (West Supp. 1995). He also included a claim for retaliatory discharge under the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1992) (re-codified as § 451.001 of the Texas Labor Code, Vernon Supp. 1995). In his Amended Complaint, Wall did not expressly state a claim of retaliation under either the TCHRA or the ADA. Record at 37-39.[1] He did, however, allege that GTE Southwest "discriminated against him on account of his . . . workers' compensation proceeding," which could be construed to be a retaliation claim under the Texas Workers' Compensation Act. Record at 43. The

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[1] Record references are to the Record on Appeal in this case.

district court assumed that Wall properly asserted retaliation claims under all three statutes. *See* Memorandum Opinion and Order, Petitioner's Appendix B, p. App. 12.

On May 31, 1994, the United States District Court for the Northern District of Texas, Judge Barefoot Sanders, entered summary judgment for GTE Southwest on all of Wall's claims. Record at 395 and Petitioner's Appendices B and C. The district court found that Wall had failed to meet his evidentiary burden on all claims of retaliation and discrimination under the TCHRA, ADA and the Texas workers' compensation statute. The Fifth Circuit Court of Appeals affirmed the district court's judgment without opinion on May 8, 1995. Petitioner's Appendix A.

Wall makes several critical omissions and misstatements in his Statement of the Case. Further, as he did in the district court and at the court of appeals, Wall repeatedly relies upon "evidence" that is inadmissible hearsay or that lacks proper foundation.[2] Following are GTE Southwest's corrections of Wall's Statement of the Case:

1. Wall mentions that his doctor restricted him to working four hours a day, but neglects to set forth other, significant physical restrictions. Wall's physician's statement also instructed that:

> (a) he could not carry more than 35 pounds;

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[2] GTE Southwest properly asserted objections to Wall's summary judgment evidence in the district court. Record at 306-309. The objections are printed here as Appendix A.

> (b) he could not stand for more than 10 minutes;
>
> (c) he could not "waist pivot" more than 55 pounds;
>
> (d) he could lift occasionally from floor to knuckle level no more than 58 pounds, from knuckle to shoulder no more than 48 pounds, and from shoulder to overhead no more than 38 pounds; and
>
> (e) he could not sit for more than four hours.

Record at 209-210. The standing and carrying restrictions, as well as the restriction that he could only work four-hour days, prevented GTE Southwest from reasonably accommodating his alleged disability.

2. Wall completely fails to mention that GTE Southwest tried to contact him twice after he was placed back on workers' compensation status in September of 1992, and that he failed to respond affirmatively to GTE Southwest's inquiries about his plans to return to work. Wall's supervisor, M. F. Fannin, wrote two letters to Wall, dated June 14, 1993 and August 12, 1993, respectively. *See* Exhibit 3 to Defendant's Motion for Summary Judgment, filed between pages 197 and 198 in the Record, and printed here as Appendix B. Wall made no response to either letter. His lawyer responded to the second letter, stating that it would be "impossible" for Wall to return to work at GTE Southwest. *See* Appendix B.

3. Wall challenges GTE Southwest's assertion that it removed Wall and his co-worker Robert Grimes from

light duty status and placed them back on workers' compensation status because there were too many people (four) working light duty. Wall claims that one of the other two men on light duty (Jim Chlebowski) had actually been released to full duty by his physician, thus leaving a light duty position "open" for Wall to fill. Wall also claims that GTE Southwest improperly filled this "open" light duty position with another employee, Steve Sanford, instead of offering it to Wall. Petition at 5. These statements were unsupported by the summary judgment evidence. First, the statement as to Chlebowski's status is inadmissible hearsay; second, the alleged assignment of Sanford to light duty is based on an inadmissible hearsay statement that contains no reference to the date of the alleged assignment, and, third, Wall offered no evidence as to the seniority of Sanford. Sanford's seniority is relevant because if Sanford was senior to Wall, then his alleged assignment to light duty before Wall would be required by the collective bargaining agreement. Record at 111.

Finally, there was no evidence adduced by Wall that there were light duty "positions" which would be filled by personnel. In fact, GTE Southwest's summary judgment evidence established that the applicable collective bargaining agreement did not provide for light duty positions at all. Petitioner's Appendix F at p. App. 33.

4. Wall states that he was "released by his treating physician to return to work at his CSS job on a 'trial basis' working approximately 4 hours/day with some various physical restrictions," and that "GTE Southwest never gave [him] the chance or the option to return to his CSS position on a trial basis, either with or without reasonable

accommodation" and "made no effort to accommodate [his] disability." Petition at 4. This characterization of the facts suggests that GTE Southwest terminated Wall's status as a CSS by allowing him to perform light duty tasks. There is absolutely no evidence in the record to suggest that Wall was removed by GTE Southwest from his CSS position while he was on workers' compensation or working light duty.

5. Wall states that he "would never receive a full duty release because Wall's restrictions were permanent." Petition at 5. This statement is pure speculation. There was no summary judgment evidence that Wall would never have received a full duty release.

6. Wall did not mention in his statement of the case that the collective bargaining agreement applicable to Wall's position states that all decisions regarding bargaining unit employees are based upon seniority, and contains a provision granting GTE Southwest the absolute right to determine the size of the work force, and to make adjustments in the size of the work force as are necessary to insure profitable operation. Record at 111 and 125 and Petitioner's Appendix F, p. App. 33. GTE Southwest's actions regarding light duty assignments were justified and required by the collective bargaining agreement.

REASONS FOR DENYING THE WRIT

1. Wall waived the question of whether an ADA plaintiff must demonstrate that he was replaced by a non-disabled person by failing to raise the issue before the court of appeals.

Wall asks this Court to review this case because the Fifth Circuit has not yet articulated the elements of a prima facie ADA case and claims that litigants in the Fifth Circuit will be "confused" by the district court's opinion. Undaunted by the fact that he could not muster competent evidence to survive summary judgment, Wall now challenges a remark made by the district court in its opinion that a few jurisdictions have required an ADA plaintiff to show that he was replaced by a non-disabled individual in order to make out a prima facie case, and that Wall had made no such showing. *See* Memorandum Opinion and Order, Petitioner's Appendix B at p. App. 20, n.9. This comment, which the district court relegated to a footnote, did not affect the decision made; the district court was merely noting that Wall's ADA claim would fail under any existing standard of proof. In any event, Wall never so much as mentioned the district court's comment in his brief to the Fifth Circuit, and the issue was not addressed. *See* Wall's Appellate Brief.[3]

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[3] Wall's Appellate Brief is printed here in its entirety as Appendix C. GTE Southwest's arguments to the Fifth Circuit, which contain more detail than those presented here, are contained in its Appellate Brief, which is printed here in its entirety as Appendix D for the Court's reference.

2. Contrary to Wall's assertion, there is no "confusion" created by the Fifth Circuit's affirmance of the summary judgment in favor of GTE Southwest.

Wall seeks review by this Court of a simple summary judgment decision that was the product of his own failure to tender competent, relevant evidence on the elements of his case. The district court correctly applied the summary judgment standard, requiring GTE Southwest to first establish that there was no genuine issue of material fact as to at least one element of each of Wall's claims, and then requiring Wall to come forward with sufficient evidence to establish a material fact issue as to the challenged elements. *See* Memorandum Opinion and Order, Petitioner's Appendix B.

To test Wall's ADA discrimination claim, the district court began with the preliminary requirements itemized in the ADA itself:

a. that Wall was required to be an individual with an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2) (West Supp. 1995);[4] and

b. that Wall was required to be a "qualified individual with a disability" – a disabled individual who, with or without reasonable accommodation, can perform the essential

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[4] The TCHRA defines "disability" the same way. Tex. Lab. Code § 21.002(4).

functions of his position. 42 U.S.C. § 12111(8) (West Supp. 1995).[5]

For purposes of the summary judgment analysis, the district court assumed that Wall was disabled under the ADA. Then, the district court reviewed Wall's summary judgment evidence of the essential functions of his job, and the accommodations he felt would have been reasonable. Because most of the evidence Wall tendered was inadmissible or otherwise incompetent, and because Wall essentially agreed with GTE Southwest that he could not perform essential functions of his job with or without reasonable accommodation, the district court found in favor of GTE Southwest, noting that Wall did not adduce sufficient evidence to show that he was a "qualified individual" as required by the Act.

3. The Fifth Circuit's affirmance of the summary judgment does not conflict with nor contravene the decision in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993).

Wall contends that when his supervisor told him that he would need a full duty medical release to return to full duty, she committed a "per se" violation of the ADA, and that he should not be required to make proof on the elements of his prima facie case. Wall cites no authority to

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[5] The TCHRA only prohibits discrimination "because of or on the basis of a physical or mental condition *that does not impair an individual's ability to reasonably perform a job.*" Tex. Lab. Code § 21.105 (emphasis added). This definition is narrower than the "with or without reasonable accommodation" language of the ADA.

support this assertion. Wall confuses the requirement of establishing material fact issues on his prima facie case with his claim that there is such a thing as a "per se" violation of the ADA.

For purposes of his petition to this Court, Wall appears to concede that the summary judgment evidence was properly analyzed using the proof requirements of *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 2747-2748 (1993). *See* Petition at 12. *St. Mary's* requires that a discrimination plaintiff show (1) that he is a member of a protected class; (2) that he was qualified for the position from which he was allegedly removed; (3) that he was adversely treated, and (4) that he was replaced by a person not of the protected class. 113 S. Ct. at 2747.

The district court looked at the ADA and applied its statutory template to Wall, asking first: (1) Was he disabled? and (2) Was he otherwise qualified to do the job with or without reasonable accommodation? 42 U.S.C. §§ 12102(2) and 12111(8) (West Supp. 1995). Wall concedes that the burden of establishing these elements is placed squarely on the ADA plaintiff by the holding in *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1386 (1994).[6] These two questions had to be answered in the affirmative before the district court would even reach the issue of GTE

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[6] *See also White v. York International*, 45 F.3d 357, 360-361 (10th Cir. 1995).

Southwest's alleged conduct.[7] Wall's summary judgment evidence was inadequate to raise a genuine issue for trial on the "otherwise qualified" prima facie element set forth by the ADA (and *St. Mary's*); accordingly, the district court properly granted summary judgment for GTE Southwest.

This same analysis may be used to validate the district court's action on Wall's retaliation claim under the ADA. Wall did not qualify as an ADA plaintiff, therefore the question of whether or not GTE Southwest committed a retaliatory adverse employment action in violation of the ADA was not even reached.[8]

Wall also contends that the summary judgment should not have been affirmed because *St. Mary's* (and presumably the ADA) require that GTE Southwest show what efforts it made to reasonably accommodate Wall. In

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[7] In any event, the supervisor's statement did not violate the ADA. She had reviewed Wall's physician's restrictions and determined that he could not perform his job with or without reasonable accommodations. Even if he had not had carrying and standing restrictions, he could not perform his CSS duties by working four-hour days. Faced with his restriction to half-duty, she was justified in seeking a full-duty release before putting him to work in his CSS function.

[8] Even if Wall had adduced sufficient summary judgment evidence to qualify as an ADA plaintiff, his retaliation claim would fail because he did not introduce any evidence of the EEOC charge on which he predicates the claim. Wall asserts that a March, 1992 EEOC charge that he filed motivated GTE Southwest to take improper adverse employment actions against him. Although he cites the Court to the Record at 250-51, 257 in his Brief at p. 16, there is no proof in the Record of an EEOC charge filed on that date.

making this argument, Wall ignores the fact that *St. Mary's* still requires that the discrimination claimant must establish that he is a qualified plaintiff before the burden shifts to the defendant. The plaintiff must supply proof of what would be a reasonable accommodation. 42 U.S.C. § 12111(8); *White v. York International*, 45 F.3d 357, 360 (10th Cir. 1995) (citations omitted). If no reasonable accommodation would have enabled the plaintiff to perform his essential functions, then it would be fruitless for the employer to make an effort to accommodate.

4. This case does not present an issue of national public import. Wall simply failed to meet his summary judgment burden and lost his case on the facts presented to the district court.

Five of Wall's Questions Presented for Review (Nos. 2, 3, 4, 5, and 6) are really nothing more than complaints that the district court erred in granting summary judgment based upon the evidence that was presented by the parties. The Fifth Circuit reviewed the district court's judgment and affirmed it. There is no need for this Court to review this case again as it turns on its own facts and does not impact other litigants. Further, the summary judgment was properly granted.

a. The undisputed facts raised no genuine issue for trial on Wall's claims of discrimination and retaliation under ADA, TCHRA or the workers' compensation statute.

GTE Southwest's summary judgment evidence established the following facts:

1) The restrictions on Wall's July 1992 medical release did not allow him to perform the essential functions of a CSS with or without reasonable accommodation (record at 207; 251; 310-311; Petitioner's Appendices E, G and I).

2) The applicable collective bargaining agreement dictated that Wall be removed from light duty before employees senior to him. Courts have not required employers to accommodate employees where the accommodation would violate the Collective Bargaining Agreement.[9] *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987); *Shea v. Tisch*, 870 F.2d 786, 789 (1st Cir. 1989).[10] Accordingly, GTE Southwest's conduct was not unlawful under either ADA or TCHRA.

3) Despite at least two written contacts by GTE Southwest, Wall never indicated an interest in

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[9] The TCHRA provides that if effective discrimination occurs in the context of a bona fide (non-subterfuge) seniority system, it is not actionable. Texas Labor Code, § 21.102. Wall did not claim (nor did the summary judgment evidence suggest) that GTE Southwest's collective bargaining agreement was a subterfuge to avoid the TCHRA.

[10] Although these two decisions were decided under the Rehabilitation Act, which protects federal employees, their findings are instructive in interpreting employers' duties under the nearly identical ADA and TCHRA. *See Wooten v. Farmland Foods*, 58 F.3d 382, 385 n.2 (8th Cir. 1995).

returning to work, much less requested an accommodation of a disability. In fact Wall, through his lawyer, notified GTE Southwest that he would not be returning. These facts establish that Wall abandoned his job voluntarily.

4) The supervisor that Wall accused of committing discriminatory and retaliatory treatment under ADA, TCHRA and the workers' compensation statute, David Debusman, transferred out of Wall's work group in May of 1992, two months before he presented his physician's statement and sought to return to work in July. Record at 310-311; Petitioner's Appendix I at p. App. 41. Debusman had no authority over Wall after that point, nor did he take any action relative to Wall. *Id.* Accordingly, Wall's summary judgment evidence regarding Dubusman, even if competent and taken as true, was irrelevant. *See* Memorandum Opinion, Petitioner's Appendix B, p. App. 14.

Wall had every opportunity to present competent summary judgment evidence in response to GTE Southwest's motion and raise genuine fact issues for trial on his ADA, TCHRA and workers' compensation claims. Discovery by both parties was complete and the case was prepared for trial. *See* Record at 16, 314, 329, 335, 351, 355, 363, 370 (scheduling order setting case for trial on June 20, 1994, and various pre-trial pleadings filed by the parties). Wall submitted his own Affidavit, along with the declarations of several individuals; but Wall's summary judgment evidence was largely inadmissible or irrelevant, and he failed to address several important flaws in his case, such as his failure to respond to the letters sent to him by GTE Southwest after he returned to workers'

compensation status in September of 1992 and moved away to South Texas, and the fact that his physical restrictions prevented him from performing his job. Further, Wall presented no evidence connecting his workers' compensation claim or any EEOC filing with adverse actions taken by GTE Southwest. Accordingly, the district court correctly held that Wall did not establish a genuine issue of material fact on the elements of his claims.

As the district court noted in its opinion, even if Wall had established a prima facie case of discrimination or retaliation under the ADA, TCHRA or Texas Workers' Compensation Act, summary judgment for GTE Southwest was still warranted because Wall did not raise any evidence suggesting that GTE Southwest's reasons for assigning him to light duty, removing him from light duty, and considering him to have abandoned his job were pretextual. *See* Memorandum Opinion and Order, Petitioner's Appendix B at p. App. 14, n. 7. GTE Southwest's reasons for its actions – that it had too many men on light duty, that Wall was relieved of light duty because of low seniority, and that it considered him to have abandoned his job because he failed to respond to his supervisor's letters – were plausible and sensible. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993) (citations omitted). Wall failed to establish otherwise when the burden returned to him to do so.

b. The district court properly evaluated GTE Southwest's evidence regarding the essential functions of the CSS job.

Wall argues that the district court improperly ignored his evidence of essential functions and gave too much weight to GTE Southwest's evidence. Petition, pp. 10-11.

Wall, having failed to offer so much as an explanation of the essential functions of the CSS job, is in no position to criticize the district court's analysis. The only competent, persuasive evidence on the essential functions of the CSS job came from GTE Southwest's witness, Facility Supervisor Terry Lumpkin. Record at 310-311; Petitioner's Appendix I. Wall provided no counter to Lumpkin's assertion that four-hour shifts on a regular basis would not satisfy GTE Southwest's customer service requirements, or that ladder work (which requires carrying more than his medical restrictions would permit) occurs even in buried cable areas, particularly where a CSS has to work under the eaves of a house. If a job requires more hours to perform than an allegedly disabled person's abilities will allow, an employer does not have to accommodate the employee in that job. *Florence v. Frank*, 774 F.Supp. 1054, 1062 (N.D. Tex. 1991) (granting summary judgment for the defendant-employer).[11] The issue of standing for periods of more than ten minutes was addressed only by Lumpkin, not by Wall.

---

[11] Although this case was decided under the Rehabilitation Act, and not the ADA, the principles are applicable. *See Wooten*, 58 F.3d at 385 n.2.

Wall's claim that he should have been allowed to attempt to perform the essential functions of the CSS position, even with his restrictions, must be rejected. Wall's physician's statement restricted Wall from performing the essential functions of the CSS job. Record at 209-212 and 310-311. The ADA cannot be read to require an employer to permit an employee to return to work and do "as much as he or she can take." *Derbis v. U.S. Shoe Corporation*, 3 AD Cases 1029, 1033 (D. Md. 1994).

c. Wall's claim that "discrepancies in testimony" preclude summary judgment in this case is unfounded.

Perhaps because he has no real evidence with which to prove his case, Wall argues that genuine issues of material fact are raised by several alleged inconsistencies in the summary judgment evidence. His attempts to create inconsistencies must be rejected because they are based on inadmissible evidence or because they are immaterial because he failed to qualify as an ADA (or TCHRA) plaintiff.

In his endeavor to create triable issues where none exist, Wall asserts that *Dibidale of Louisiana v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990), *mod.* 941 F.2d 309 (5th Cir. 1991), requires reversal of this summary judgment because "discrepancies in testimony raise credibility issues which are properly for the factfinder to weigh." Petition at 18-19. *Dibidale* does not apply to this case. In *Dibidale*, the Fifth Circuit was reluctant to affirm a summary judgment in the face of inconsistencies between *a single witness's* own deposition and affidavit testimony.

916 F.2d at 307. The inconsistencies alleged by Wall are not assigned to a single witness; accordingly, there is no credibility issue for trial.

CONCLUSION

The district court correctly entered summary judgment for GTE Southwest in this case; therefore the Fifth Circuit correctly affirmed the judgment. Wall failed to produce competent summary judgment evidence sufficient to raise a material fact issue on critical prima facie elements of his claims; still he complains that the courts below treated him unfairly. Some of his arguments are the same ones he made to both the district court and the court of appeals, based upon inadmissible and irrelevant evidence; others were never raised below. None of the arguments provide a basis for this Court to exercise its jurisdiction.

Wall's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

On Brief:

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APPENDIX A

EXHIBIT A

Objections to Summary Judgment
Evidence of Michael Wall

WALL'S AFFIDAVIT:

1.	pp. 2-3	"It was my understanding from Dr. Cable that I was to return to work on a trial basis . . . fairly re-evaluated." These statements are hearsay and inadmissible.
2.	p. 3	"I have since learned from Jim Chlebowski . . . I was told by Bo Ellerbee . . . " These statements are hearsay and do not fall within the exception for admissions by a party opponent because these employees, Chlebowski and Ellerbee are not authorized to make such statements for GTE. The statement as to Ellerbee is without foundation since there is no evidence of Ellerbee's restrictions. Wall's statement can only be based upon hearsay and, as such is inadmissible.
3.	p. 3	"I later called an "in-charge" or acting supervisor . . . According to Hansen, Chasak stated . . . Hansen told me that she was sorry . . . " These statements are either first- or second-hand hearsay and inadmissible.
4.	p. 3	"I also spoke to Keith Huyck, a Union Steward . . . and he told me he did not know . . . "

		These statements are hearsay and inadmissible.
5.	p. 4	"Steve Sanford was brought in to work light duty after I was taken off light duty. I was told this by Don Ingram or Keith Irwin . . . " These statements are hearsay and do not fall within the exception for admissions by a party opponent because these employees, Ingram and Irwin are not authorized to make such statements for GTE. Statements as to Ingram and Irwin are without foundation since there is no evidence of Ingram or Irwin's restrictions. Wall's statement can only be based upon hearsay and, as such is inadmissible.
6.	p. 4	"I was thus terminated because GTE was aware . . . " This statement is inadmissible because it is completely speculative and without foundation.
7.	p. 5	Entire Paragraph beginning: "I was discriminated against and terminated . . . " This paragraph contains nothing more than conclusory and speculative statements for which there is no foundation. Further, statements related to pain and mental anguish are not relevant to the summary judgment issues and should be disregarded for that purpose.

OTHER WITNESS STATEMENTS:

8. Att. 4 — This unsworn statement by Keith Erwin is inadmissible.

9. Att. 5 — " . . . for towns around Angleton Tex that Michael could Bid on when he moved Back in with his wife who lived in Angleton."
This portion of Keith Erwin's statement can only be based upon hearsay, either because he overhead Wall or Logan say something, or because Wall told him this story. As such, the statement is inadmissible.
"This tells me GTE (Gina Logan) new [sic] Michael was moveing [sic] to Angleton Tex."
This statement is inadmissible as speculation.

10. Atts. 5, 6, 7, 8 — All of these Attachments contain statements signed by Erwin, Ingram, McBride and Huyck in which they indicate "concurrence" with or "approval" of statements obviously made by Wall, either in a typewritten paragraph, or in a letter he allegedly wrote to GTE official Charles Lee in September of 1992. These "concurrences" must be stricken as entirely improper. They are not the testimony of the declarants; rather, they are the attempted testimony of Wall, to which he is soliciting agreement from these witnesses. The statements by Wall, both in the typewritten paragraph, and in his letter to Lee are inadmissible hearsay. In addition, they speculate

about the states of the minds of others, they make factual and legal conclusions with no foundation, and they include self-serving opinions about supposed actions of David Debusman and GTE. All of these statements, and the letter to Lee must be stricken from the summary judgment record.

11. Att. 7 "I feel you could . . . say that Dave Debusman was also trying to intimidate our workgroup."
"David Debusman . . . stated that Mike Walls & Richard Grimes problems with their back injuries were "Bull Shit."
The first statement by John McBride is inadmissible as speculation. Both statements are inadmissible because they are irrelevant to Wall's case, particularly since Debusman was not even employed in the Plano facility after May of 1992.

12. Att. 8 The entirety of Huyck's statements are inadmissible as entirely irrelevant to this case. Again, Debusman was no longer Wall's supervisor after May of 1992, and had no influence over his employment.

13. Att. 10 Ms. Wright's entire statement is inadmissible as summary judgment evidence because it is irrelevant to the issues raised in the summary judgment context. Neither GTE nor Wall has made an issue of alleged mental anguish or damages in the summary judgment phase of this case. Evidence of his state

of mind is offered only in an attempt to prejudice the legal issues discussed in the summary judgment context, and to attempt to garner sympathy for his case. Further, Ms. Wright's statement is based upon the hearsay statements of Wall and is inadmissible on that basis.

12. Att. 11 — Wall's mother's statement is inadmissible as summary judgment evidence because it is irrelevant to the issues raised in the summary judgment context. Neither GTE nor Wall has made an issue of alleged mental anguish or damages in the summary judgment phase of this case. Evidence of his state of mind is offered only in an attempt to prejudice the legal issues discussed in the summary judgment context, and to attempt to garner sympathy for his case. Its prejudicial effect outweighs its probative value, and it must be stricken.

13. Att. 12 — Wall's son's statement is inadmissible as summary judgment evidence because it is irrelevant to the issues raised in the summary judgment context. Neither GTE nor Wall has made an issue of alleged mental anguish or damages in the summary judgment phase of this case. Evidence of his state of mind is offered only in an attempt to prejudice the legal issues discussed in the summary judgment context, and to attempt to garner sympathy for his case. Its prejudicial effect outweighs its probative value, and it must be stricken.

14.	Att. 13	Ginger Stephens' statement is inadmissible as summary judgment evidence because it is irrelevant to the issues raised in the summary judgment context. Neither GTE nor Wall has made an issue of alleged mental anguish or damages in the summary judgment phase of this case. Evidence of his state of mind is offered only in an attempt to prejudice the legal issues discussed in the summary judgment context, and to attempt to garner sympathy for his case. Its prejudicial effect outweighs its probative value, and it must be stricken.
15.	Att. 14	Sowana Johnson's statement is simply irrelevant. Whether or not Wall is seeking employment is not an issue in this summary judgment context. The statement must be stricken.
16.	Att. 15	Wall's wife's statement is inadmissible as summary judgment evidence because it is irrelevant to the issues raised in the summary judgment context. Neither GTE nor Wall has made an issue of alleged mental anguish or damages in the summary judgment phase of this case. Evidence of his state of mind is offered only in an attempt to prejudice the legal issues discussed in the summary judgment context, and to attempt to garner sympathy for his case. Its prejudicial effect outweighs its probative value, and it must be stricken.

APPENDIX B

EXHIBIT 3

DECLARATION OF M.F. FANNIN

My name is M.F. Fannin. I am of sound mind, capable of making this Declaration, and personally acquainted with the facts herein stated:

1. Currently, I am employed by GTE Southwest Incorporated. I have served a total of 23 years and 11 months with the company. I currently occupy the position of Facilities – Outside Plant Supervisor, and occupied that position in 1993. I work at GTE's facility in Plano, Texas. I have personal knowledge of the facts set forth in this Declaration, and they are true and correct. I am familiar with the records attached to my Declaration as Exhibits "A" through "C". The records are exact duplicates of documents from the business records of GTE Southwest Incorporated. They were kept by GTE Southwest in the regular course of business, and it was the regular course of business of GTE Southwest for an employee or representative of GTE Southwest with knowledge of the act, event, opinion, condition or diagnosis recorded to make the record or to transmit information to be included in the record. The records were made at or near the time or reasonably soon thereafter.

2. On June 14, 1993, I sent a letter to Michael Wall, who had been a Customer Service Specialist in the Plano facility, but who was out because of a back problem. A true and correct copy of the letter I sent Mr. Wall is attached as Exhibit "A" to my Declaration. I did not hear anything in response to this letter. On August 12, 1993, I

sent a follow up letter to Mr. Wall, at the same address, giving him until August 27, 1993 to contact a supervisor. A true and correct copy of this letter is attached as Exhibit "B." Again, I did not hear anything from Mr. Wall. Instead, I received a letter from John Wall dated August 26, 1993, a copy of which is attached as Exhibit "C." To my knowledge, Michael Wall was never released for full duty at GTE, and never made any attempt to return to work at GTE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON 2/16/94, 1994.

/s/ M.F. FANNIN
M.F. FANNIN

DECLARATION OF M.F. FANNIN – Page solo

FEB-16-1994 14:36 FROM GTE-SW LEGAL TXD1972A
TO 94225635 p.04

[LOGO] **GTE Telephone Operations**
Central Area

June 14, 1993

Michael F. Walls
208 Plantation
Angelton, TX 77515

Dear Michael:

This is to inform you that your benefits expired on May 5, 1993. You then had three weeks of vacation that carried you until May 26, 1993.

You should contact your immediate supervisor to notify him of your wish to return to work, or your decision to resign. You also have an option of Leave of Absence (LOA) of six months. LOA is strictly voluntary.

/s/ M.F. Fannin
M.F. Fannin
Facilities/Outside Plant Supv.
MF:cm

EXHIBIT B

[LOGO] **GTE Telephone Operations**
Central Area
August 12, 1993

Michael R. Wall
608 Plantation
Angelton, TX 77515

Dear Michael:

This is a follow up letter to the one dated on June 14, 1993. Your benefits had expired on May 5, 1993 and you had three weeks of vacation that carried you until May 26, 1993. You also had an option to take a Leave of Absence (LOA) of six months. LOA is strictly voluntary.

We have not heard from you as to your decision. You should contact a supervisor by August 27, 1993, at 214/578-3317. If you do not respond by that date, we will consider that you elected to be no longer employed by GTE.

/s/ M. F. Fannin
M. F. Fannin
Facilities/Outside Plant Supv.

MF:cm

c: Doug Patton – TXD1931C – Irving, Tx

FED-16-1994 14:36 FROM GTE-SW LEGAL TXD1972A
TO 94225635 P.06

09-31-93 01:48 pm FROM PLANO YARD/SVC 801/03

JOHN WALL, JR-ATTORNEY TEL No. 2149687629

Aug 26.93 11:49 No.004 P.02

Law Office Of
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Dallas, Texas 75204
(214) 871-8808

Toll Free
1-800-635-0773

Telecopy
(214) 909-7629

August 26, 1993

VIA TELECOPY 214/422-5635

M.F. Fannin
Facilities/Outside Plant Supervisor
c/o GTE Telephone Operations
Central Area
2201 Avenue I
Plano, Texas 75074

RE: *Michael R. Wall*

Dear Mr. Fannin:

I write in reply to your letter of August 12, 1993 addressed to Mr. Michael R. Wall. As you may or may not be aware, Mr. Wall is represented by me. Mr. Wall would dearly love to hang onto his position at GTE, however, it has been impossible due to your employer's discriminatory practices.

As I am sure you are aware, Mr. Wall has pressed his charges of discrimination through the Equal Employment

Opportunity Commission (EEOC) and this could only constitute further retaliation for having asserted his rights as provided by law.

Please direct all further correspondence to your attorney, who in kind will address it to me.

Very truly yours,

/s/ John E. Wall, Jr.
John E. Wall, Jr.

JEW:myb

cc: Ms. Kathleen Bagwell Palter
GTE Southwest Incorporated
500 E. Carpenter Freeway
P.O box 152013
Irving, Texas 75015-2023
VIA TELECOPY 214/717-7895

Michael R. Wall
608 Plantation
Angelton, Texas 77515

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

No. 94-10612

MICHAEL R. WALL, Plaintiff-Appellant,

v.

GTE SOUTHWEST INCORPORATED,
Defendant-Appellee

BRIEF FOR APPELLANT

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Attorney for Appellant

September 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

No. 94-10612

MICHAEL R. WALL, Plaintiff-Appellant,

v.

GTE SOUTHWEST INCORPORATED,
Defendant-Appellee

BRIEF FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. Michael R. Wall, Appellant

B. John E. Wall, Jr., Attorney for Appellant

C. GTE Southwest Incorporated, Appellee

D. Kathleen Elizabeth Palter and J. Cody Wilbanks, Attorneys for GTE Southwest Incorporated, Appellee.

/s/ John E. Wall
John E. Wall, Jr.
Attorney of Record
for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the provisions of Fed. R. App. P. 28 and Local Rule 28.2.4, Appellant hereby requests oral argument before the Court in this cause. Oral argument is necessary so that Plaintiff-Appellant may assure himself that he has requested or invoked every conceivable means available to persuade the Court of the propriety of his position and the error of the district court's ruling. Oral argument in Plaintiff's belief would assist the Court in resolution of this case.

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ARGUMENT 9

1. The district court held that the Plaintiff-Appellant failed to establish material fact issues regarding the existence of a causal connection between his workers' compensation proceeding and the adverse employment actions which were taken against him, including termination. (ROA 385-86, 394). Was this error? 10

2. The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of discrimination under the Americans with Disabilities Act because he failed to establish that he was a "qualified individual with a disability", i.e., that he was not "otherwise qualified" to perform his former job. (ROA 392). Was this error?..... 17

3. The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of discrimination under the Texas Commission on Human Rights Act. (ROA 393). Was this error? 26

4. The district court disregarded the abundant summary judgment evidence which established material fact issues regarding whether Wall was discriminated against based on his disability or his workers' compensation claim when he was removed from the workplace and terminated. (386-87, 392, 394). Was this error? 28

5. The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of retaliation under the Americans with Disabilities Act. (ROA 386-87, 394). Was this error? 32

6. The district court held that even if the Plaintiff-Appellant established a *prima facie* case of retaliation under the Americans with Disabilities Act, the summary judgment evidence was not sufficient to establish a genuine issue of material fact that the Defendant-Appellee's stated reasons for its employment decisions were a pretext for discrimination. (ROA 386-87). Was this error?..... 34

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STATEMENT OF JURISDICTION

This is an appeal from a final order rendered on May 31, 1994 over which this Court has jurisdiction pursuant to 28 U.S.C.A. § 1291.

UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

No. 94-10612

MICHAEL R. WALL, Plaintiff-Appellant,

v.

GTE SOUTHWEST INCORPORATED,
Defendant-Appellee

BRIEF FOR APPELLANT

STATEMENT OF THE ISSUES

1. The district court held that the Plaintiff-Appellant failed to establish material fact issues

regarding the existence of a causal connection between his workers' compensation proceeding and the adverse employment actions which were taken against him, including termination. (ROA 385-86, 394)[2]. Was this error?

2. The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of discrimination under the Americans with Disabilities Act because he failed to establish that he was a "qualified individual with a disability", i.e., that he was not "otherwise qualified" to perform his former job. (ROA 392). Was this error?

3. The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of discrimination under the Texas Commission on Human Rights Act. (ROA 393). Was this error?

4. The district court disregarded the abundant summary judgment evidence which established material fact issues regarding whether Wall was discriminated against based on his disability or his workers' compensation claim when he was removed from the workplace and terminated. (386-87, 392, 394). Was this error?

5. The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of retaliation under the Americans with Disabilities Act. (ROA 386-87, 394). Was this error?

6. The district court held that even if Plaintiff-Appellant established a *prima facie* case of retaliation under the Americans with Disabilities Act, the summary judgment evidence was not

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[2] "ROA" refers to the Record on Appeal in this case.

sufficient to establish a genuine issue of material fact that the Defendant-Appellee's stated reasons for its employment decisions were a pretext for discrimination. (ROA 386-87). Was this error?

STATEMENT OF THE CASE

i. Course of Proceedings and Disposition in Court Below

Appellant, Michael R. Wall ("Wall") brought suit against is [sic] former employer, Appellee GTE Southwest Incorporated ("GTE"), pursuant to article 8307c of the Texas Workers' Compensation Act, the Americans with Disabilities Act and the Texas Commission on Human Rights Act. Suit was originally filed in the 162nd Judicial District Court in Dallas County, Texas; however, the Defendant removed the case to federal court under 28 U.S.C. 1441. Thereafter, GTE filed Defendant's Motion for Dismissal or Summary Judgment with Supporting Brief.

The district court denied GTE's motion for dismissal, but granted summary judgment as to all of Wall's claims. The district court ruled that Wall failed to establish a causal connection between his workers' compensation claim and the adverse employment actions taken against him. The district court further held that Wall failed to establish a *prima facie* case of retaliation and discrimination under both the Americans with Disabilities Act and the Texas Commission on Human Rights Act. GTE's motion for summary judgment was granted in an order signed May 31, 1994. (ROA 395). Wall timely brings this appeal.

ii. Statement of Facts

Wall began working for GTE as a Customer Service Specialist ("CSS") on September 13, 1982. (ROA 250). As a CSS, Wall traveled to GTE's customers' locations to perform installations and repairs on residential and small business telephones. (ROA 250).

On March 6, 1992, Wall suffered a back injury while on the job, working out of Appellee's Plano facility. (ROA 250). Wall was taken off from work by his doctor. (ROA 250). After having been off from work as a result of the March 6, 1992 on-the-job injury, Wall returned to work at GTE in approximately July 1992 with permanent restrictions placed on him by his doctor. (ROA 250). Specifically, Wall was released by his treating physician to return to work at his CSS job on a "trial basis" working approximately 4 hours/day with some various physical restrictions. (ROA 250-51). Wall was to follow up with his physician in two weeks to see how he was adjusting at his CSS job with the restrictions. (ROA 251).

Wall was employed as a CSS, but upon his return to work, GTE placed him in a light duty position rather than placing him in his former CSS position. (ROA 251). After Wall was placed under the permanent restrictions by his physicians, GTE never gave Wall the chance or the option to return to his CSS position on a trial basis, either with or without reasonable accommodation. (ROA 251). GTE made no effort to accommodate Wall's disability so as to enable him to perform his CSS job. (ROA 251).

On or about September 17, 1992, Fred Chasak, Wall's supervisor, informed Wall and Robert Grimes (another

GTE employee on light duty after an on-the-job injury) that there were four people on light duty. (ROA 252). Chasak told Grimes and Wall that they were being removed from light duty work and placed back on workers' compensation. (ROA 252). According to Chasak, there was not enough light duty work for four employees and that he was placing Wall and Grimes back on workers' compensation. (ROA 252). Bo Ellerbee and Jim Chlebowski, were the other two employees who had previously been working on light duty with Grimes and Wall. (ROA 252). In actuality, Chlebowski was no longer on light duty at this time, but rather had been released to return to full duty work on or about September 14, 1992. (ROA 252). Thus, contrary to GTE's claim, Chlebowski's light duty position was available on September 17, 1992. (ROA 70, 207, 252).

After Wall was removed from light duty, he later called Barbara Hanson, a union steward, to see what he would need to do in order to return to work. (ROA 252). According to Hanson, Chasak stated that before Grimes and Wall could return to work they would have to receive a full duty release from their doctors or more light duty would have to become available. (ROA 252). Wall would never receive a full duty release because Wall's restrictions were permanent. (ROA 251). When more light duty became available, GTE did not offer it to Wall but rather filled the position with another employee. (ROA 252-53).

Wall was never offered another light duty position. (ROA 253). Wall was not offered Chlebowski's former light duty position. (ROA 252). By GTE's own admission, Wall, as the next most senior employee, should not have been removed from light duty in September 1992. (ROA

70, 207). Nevertheless, Wall was removed from the workplace. (ROA 252). Thus, Wall was terminated, as opposed to having abandoned his job. (ROA 253).

As of September 17, 1992, GTE failed to allow Wall to return to work and failed to otherwise accommodate Wall's disability. (ROA 251-53). As a result, Wall filed suit to recover damages which he suffered as a result of the actions of GTE which are prohibited under article 8307c of the Texas Workers' Compensation Act ("8307c"), Article 5221k of the Texas Commission on Human Rights Act ("TCHRA") and the Americans with Disabilities Act ("ADA"). (ROA 42-44).

SUMMARY OF THE ARGUMENT

There are genuine issues of material fact regarding the summary judgment evidence which establishes that Wall was discriminated and retaliated against in violation of the ADA, the TCHRA and article 8307c of the Texas Workers' Compensation Act.

The summary judgment evidence establishes that: Wall injured his back on the job at GTE and filed a workers' compensation claim; Wall was harassed and humiliated by GTE regarding his injury and workers' compensation claim; Wall filed a charge of discrimination against GTE; GTE failed to accommodate, or even attempt to accommodate, Wall's disability; GTE refused to place Wall in his regular CSS position, despite the doctor release to allow Wall to return to work on a trial basis; GTE placed Wall in a light duty position rather than in his former position and then terminated Wall and another employee allegedly because there was not enough light

duty work for four employees; contrary to GTE's claim, at the time of termination there was a light duty position available; Wall was the next most senior employee, yet Wall was not placed in the available position; by GTE's own admission, under the seniority system, Wall should not have been removed from the workplace; and despite GTE's claim that Wall could return to work if a light duty position became available, when a position became available, another employee was placed in the position instead of Wall. GTE has serious credibility problems which preclude summary judgment.

There was sufficient summary judgment evidence from which a reasonable factfinder could determine that Wall was a victim of discrimination and/or retaliation. Nevertheless, the district court granted summary judgment. This was error.

ARGUMENT

Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only where there is no genuine issue as to any material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *St. Amant v. Benoit*, 806 F.2d 1294 (5th Cir. 1987), *citing Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). It is the movant's burden to inform the Court of the basis for it's [sic] motion, and to specifically identify those portions of the evidence which it believes demonstrates the absence of a genuine issue of material fact. *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987). In the event the

movant satisfies this burden, the burden shifts to the non-movant to set forth specific facts that establish an issue for trial. *Id.* When reviewing a motion for summary judgement, the court must review the facts of the case drawing all inferences in favor of the non-movant. *Jurgens v. E.E.O.C.*, 903 F.2d 386, 388 (5th Cir. 1990). The Supreme Court has held that if a "reasonable jury" could differ as to the proper conclusion of the case based on the facts presented, then summary judgement is not proper. *Anderson v. Liberty Lobby*, 477 U.S. at 242.

If there are *any* reasonable doubts or inferences, they must be decided in the light most favorable to the party opposing the motion. (emphasis added) *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985). *Thornbrough* states:

> In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous of motivation and intent. Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder.

Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d at 640-641. The evidence in support of Wall's discrimination and retaliation claims establishes genuine issues of material fact, therefore, the district court erred in granting summary judgment in the present case.

ISSUE NO. 1 (RESTATED)

The district court held that the Plaintiff-Appellant failed to establish material fact issues regarding the existence of a causal connection between his workers' compensation proceeding and the adverse employment actions which were taken against him, including termination. (ROA 385-86, 394). Was this error?

The district court granted summary judgment on Wall's claim brought pursuant to Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1992)[3] reasoning that Wall failed to establish a causal connection between his workers' compensation claim and GTE's adverse employment actions. (ROA 395). The court granted summary judgment despite overwhelming evidence of the requisite "causal connection" in an article 8307c claim. (ROA 234, 395).

In Texas, to maintain a cause of action under article 8307c, the plaintiff need only establish a causal connection between his workers' compensation proceeding and his termination. *Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1090 (5th Cir. 1991); *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 522 (Tex. App. – Corpus Christi 1993, writ dism. agr.). In an article 8307c case, the plaintiff need not prove that the claim for workers' compensation benefits was the sole basis for the termination. *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App. – El Paso 1986) *aff'd*, 734 S.W.2d 667 (Tex. 1987). To prevail, the plaintiff need only

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[3] Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1992) was repealed and recodified in Sections 451.001-.003 of the Texas Labor Code. This recodification did not change the substantive law.

show that the workers' compensation claim or proceeding "contributed" to the employer's decision to terminate the plaintiff. *Borden, Inc. v. Guerra,* 860 S.W.2d at 522, *citing, Mid-South Bottling v. Cigainero,* 799 S.W.2d 385, 389 (Tex. App. – Texarkana 1990, writ denied). The employer must rebut by showing a legitimate reason for the discharge; however, the employee may still recover damages if retaliation was a factor. *See, Jones v. Roadway Exp., Inc.,* 931 F.2d at 1090. Causation may be established either by direct evidence, or by circumstantial evidence, and by the reasonable inferences which can be drawn from such evidence. *Investment Properties Management v. Montes,* 821 S.W.2d 691, 694 (Tex. App. – El Paso 1991, no writ), *citing Paragon Hotel Corp. v. Ramirez,* 783 S.W.2d 654, 658 (Tex. App. – El Paso 1989, writ denied).

In an article 8307c case, the existence of a "causal link" is determined on a case by case basis. *Investment Properties Management v. Montes,* 821 S.W.2d 691. It is well settled that there are a variety of factors, none of which are consistently required, which courts have considered in deciding whether or not there is a causal link between the workers' compensation proceeding and the termination. Courts have found the following factors, all of which are evidenced in this case, supportive of the existence of a causal link:

(a) Knowledge of the claim by those making the decision to discharge. *Investment Properties Management v. Montes,* 821 S.W.2d at 694; *Paragon Hotel Corp. v. Ramirez,* 783 S.W.2d at 658; *Parham v. Carrier Corp.,* 9 F.3d 383 (5th Cir. 1993). This factor is evidenced in the declaration of Gina Logan and the declaration of Douglas Patton. Logan

and Patton each acknowledge Wall's worker's compensation injury and also explain the reason Wall was not accommodated and the reason he was taken off light duty. (ROA 70, 207).

(b) Negative comments were made by the employer regarding the workers' compensation claim. *General Electric v. Kunze*, 747 S.W.2d 826. GTE's negative attitude toward Wall's workers' compensation claim, as well as Robert Grimes' workers' compensation claim, permeated the workplace. On numerous occasions, Wall's former supervisor David Debusman, openly harassed, humiliated and ridiculed both Wall and Grimes for filing workers' compensation claims. (ROA 262, 263-66, 270-75, 279-80, 281-82). Debusman stated to other GTE employees that Wall and Grimes were faking their on-the-job injuries and that their injuries were "bulls___t". (ROA 263-66, 270-75, 281-82). Debusman also stated that Wall should have never been hired because he was probably predisposed to back injuries or had hurt his back before starting to work at GTE. (ROA 270-75, 281-82). Debusman's derogatory and inflammatory statements regarding Wall's workers' compensation claim were made on numerous occasions. These negative comments were made in front of supervisors and co-workers at GTE during safety committee meetings. (ROA 263-66, 270-75, 279-80, 281-82).

Ultimately, as was Debusman's apparent desire, both Wall and Grimes were removed from the workplace. (ROA 252, 254, 281-82). Despite the evidence of Debusman's repeated outrageous comments regarding Wall's workers' compensation claim, the district court concluded that there was no evidence of a causal connection

between Wall's workers' compensation claim and Wall's removal from the workplace. (ROA 385). The district court reasoned that there was no "causal connection" because Debusman was no longer Wall's supervisor at the time GTE refused to return him to his CSS job and at the time he was removed from light duty. (ROA 385-86). Indeed, Debusman had been transferred to another department prior to Wall's return to work; however, Debusman's discriminatory conduct was blatant and continuous and apparently ratified by GTE. GTE presented no summary judgment evidence that it did not condone or adopt Debusman's discriminatory conduct. The Fifth Circuit has recognized that when an employee's unlawful conduct is continuous and pervasive, then the employer is deemed to have had constructive knowledge of the discriminatory conduct. *See, Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994). Furthermore, Debusman's negative attitude toward workers' compensation claims was encouraged and motivated by GTE in that Debusman's pay raises were directly linked to the number of on-the-job injuries in his department. ((ROA 279).

GTE's encouragement and tolerance of Debusman's repeated and pervasive discriminatory conduct toward injured workers' establishes material fact issues regarding whether this same discriminatory animus motivated GTE to refuse to accommodate Wall and ultimately terminate him less than 2 months after his return to work after being injured on the job. Wall presented ample summary evidence of GTE's negative attitude toward workers' compensation claims; therefore, summary judgment was not proper on Wall's article 8307c claim.

(c) Expression of a negative attitude toward the plaintiff's injured condition. *Investment Properties Management v. Montes,* 821 S.W.2d at 694-695; *Paragon Hotel Corp. v. Ramirez.* This factor is evidenced by the flagrant negative comments made by David DeBusman, which were discussed in section (c) above, regarding Wall's back injury and workers' compensation claim. (ROA 254, 263-282).

GTE's practice of discouraging reports of accidents and injuries is further evidence of GTE's negative attitude toward injured workers, such as Wall. Employee's with negative attitudes toward injured workers and workers' compensation claims were encouraged and rewarded by GTE. Specifically, Debusman's negative attitude was no doubt fueled by the fact that his future pay raises were determined based on the number of workers' compensation injuries in his department. (ROA 279). This company practice establishes material fact issues regarding whether GTE discriminated against employees with workers' compensation claims by prompting its supervisors to discourage reports of on-the-job injuries. Evidence of such company policies demonstrates GTE's negative attitude toward Wall's injured condition and workers' compensation claim.

(d) Discriminatory treatment of the Plaintiff after being released to return to work by the doctor. *Paragon Hotel Corp. v. Ramirez,* 783 S.W.2d at 658. This factor is evidenced in the fact that Wall was forced to work on light duty rather than at his CSS job. (ROA 209, 251-52). GTE failed to accommodate Wall with respect to his CSS job even though his doctor released him for work on a

trial basis. (ROA 209, 251-52). Wall was further discriminated against when he was removed from light duty. (ROA 252) This was discriminatory because there was light duty available, which was never offered to Wall despite his right to it under the seniority system. (ROA 70, 207, 252-53).

(e) Testimony by the Plaintiff that the discharge was in part a result of his compensation proceeding. *General Electric v. Kunze*, 747 S.W.2d at 830. This factor is evidenced in the Affidavit of Michael R. Wall. (ROA 254).

(f) Inconsistent and contradictory statements by defendants. *Investment Properties Management v. Montes*, 821 S.W.2d at 695-696; *Mid-South Bottling v. Cigainero*, 799 S.W.2d 385 at 389. GTE has serious credibility problems in this case with respect to the reasons Wall was removed from light duty. Gina Logan and Douglas Patton both claim that two employees, Wall and Grimes, had to be removed from light duty on September 17, 1992 because there was not enough work for four light duty employees. (ROA 70, 207). Logan and Patton claim that Wall and Grimes were chosen for removal over the other two light duty employees based on seniority. (ROA 70, 207).

In contrast, Wall presented summary judgment evidence that one of the two employees allegedly retained for light duty had actually been released to full duty prior to September 17, 1992. (ROA 252). Thus, contrary to GTE's claim, there was a light duty position available for Wall, who was more senior than Grimes, at the time he was removed from the workplace. Furthermore, Wall was

then told he could not return to work unless his restrictions were removed or unless more light duty became available; however, when another light duty position became available Wall was not offered the position. (ROA 252-53). This alone can support a verdict. *See, Acme Boot Co. v. Montenegro,* 862 S.W.2d 806, 809 (Tex. App. – El Paso 1993, no writ). The inconsistency in GTE's actions and statements establishes material fact issues regarding GTE's credibility and the illegitimacy of GTE's reasons for removing Wall from light duty.

GTE's credibility problems are further evidenced in the false statements made by Logan regarding her knowledge of Wall's move to Angleton, Texas and her claim that Wall spoke to her instead of Hanson about returning to work. (ROA 208). Wall presented summary judgment evidence which directly disputes Logan's statements. (ROA 253, 261). The resolution of this fact dispute is material to the case as it relates directly to GTE's alleged claim that Wall abandoned his job as opposed to being terminated. Also, as a matter of law, abandonment did not occur. *See, Sanchez v. Johnson & Johnson Medical, Inc.,* 860 S.W.2d 503 (Tex. App. – El Paso 1993, no writ).

Although present in varying combinations, and in some cases in combination with other factors not applicable to this case, each of the factors listed have been recognized as evidence of the required "causal link" in an 8307c claim. Each of these same factors exist in the present case, and constitute evidence of a causal link between the institution of Wall's worker's compensation proceeding and the adverse employment actions, including termination, to which he was subjected. Thus, it was error to grant summary judgment on Wall's 8307c claim.

ISSUE NO. 2 (RESTATED)

The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of discrimination under the Americans with Disabilities Act because he failed to establish that he was a "qualified individual with a disability", i.e., that he was not "otherwise qualified" to perform his former job. (ROA 392). Was this error?

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms. conditions and privileges of employment." 42 U.S.C. § 12112(a) (West Supp. 1994).

In its opinion, the district court noted that the Fifth Circuit has not yet articulated the elements for a *prima facie* case of discrimination under the ADA. (ROA 392). Indeed, Wall has been unable to locate such a case to date; however, it would appear that in passing the ADA, the legislature intended that the case law established under the Rehabilitation Act of 1973 be used in deciding cases brought under the ADA. *See*, 42 U.S.C. § 12117(b). Also, the Fifth Circuit has noted that the *prima facie* case and the available defenses under the ADA and the Rehabilitation Act are substantially similar. *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993). In accordance with *Chandler*[4] and the legislative intent; Wall asserts that

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[4] The Fifth Circuit has held that the elements for a *prima facie* case of discrimination under the Rehabilitation Act, to wit:

a *prima facie* case of discrimination under the ADA is as follows: (1) the employee is disabled as that term is defined in the ADA; (2) the employee is otherwise qualified to perform his job; (3)the employee was subjected to an adverse employment action. The summary judgment evidence establishes that Wall's *prima facie* case of discrimination.

A. Wall is "Disabled"

For an employer to be liable under the ADA, it must first be established that the employee has a "disability" as defined by the statute. The ADA defines a disability as: a physical or mental impairment that substantially limits one or more of an individual's major life activities; a record of such impairment; or being regarded as having such an impairment. *See*, 42 U.S.C. § 12101(a)-(c); *Coughlan v. Heinz*, 851 F.Supp. 808 (N.D. Tex. 1994). In this case, Wall has a back injury which limits his mobility, and his ability to lift, carry and stand. (ROA 209, 250-51). Wall's restrictions are permanent. (ROA 209, 250). The district court found, based on the summary judgment evidence, that Wall has a disability as that term is defined by the statute. (ROA 388).

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(1) the employee is an individual with a handicap as that term is defined in the ACT; (2) the employee is otherwise qualified to perform his job; (3) the employee is employed by a program receiving federal financial assistance; and (4) the employee was adversely treated. *See, Chandler v. City of Dallas*, 2 F.3d 1385.

B. Wall is "Qualified"

Once it is determined that the employee has a disability, it must be determined that the employee is a "qualified individual with a disability", or in other words, that the employee is "otherwise qualified" to perform his job before an employer may be liable under the ADA. The ADA defines such a person as a disabled person, who, either with or without reasonable accommodations, can perform the essential functions of the job he holds or desires. 42 U.S.C. § 12111(8). Under the applicable regulations, an individual is "otherwise qualified" for a job except that, because of the disability, reasonable accommodations must be made to allow the person to perform the job's essential functions. 29 C.F.R. App. § 1630.9 (1992).

In this case, the district court found that Wall did not prove to be "otherwise qualified" for the CSS job. (ROA 388-89, 392). The district court reasoned that Wall was unable to perform all of the essential functions of his CSS job, and that the summary judgment evidence did not raise a fact issue as to whether reasonable accommodation would enable Wall to perform the essential elements of the job. (ROA 391).

i. The Essential Elements

The ruling from the district court hinged on a determination of the essential elements of the CSS job. The district court disregarded the summary judgment evidence presented by Wall regarding his actual duties as CSS and appeared to exclusively rely on GTE's claimed

version of the essential elements of the job. (ROA 389-91). The district court granted summary judgment despite the existence of material fact issues regarding the essential elements of Wall's CSS job which should have been left for the factfinder.

Specifically, there was conflicting evidence regarding the frequency and amount of weight required to be lifted as a CSS. (ROA 251, 259, 311). Wall had some various lifting and carrying restrictions with the maximum weight allowed being 58 pounds. (ROA 209). Wall presented summary judgment evidence that frequent heavy lifting was not required, and that he could stay within his restrictions and still perform the CSS duties. (ROA 251, 259). In contrast, GTE claimed that frequent lifting of up to 60 pounds was required. (ROA 311).

There was also conflicting evidence regarding whether the job could be performed in a 4 hour shift rather than an 8 hour shift. (ROA 251, 310-11). One of Wall's restrictions was that he work in 4 hour shifts. (ROA 209, 250). Wall presented summary judgment evidence that the CSS job could be and had been performed in 4 hour shifts. (ROA 251). In contrast, GTE maintained that an 8 hour shift was essential. (ROA 310-11).

There was further conflicting evidence regarding the length of time a CSS was required to spend on a ladder. (ROA 251, 310). Wall's summary judgment evidence indicates that in the Plano area where he was assigned to work as a CSS, 90% of the cable was buried, thus eliminating the need to spend significant time on a ladder or carrying a ladder. (ROA 251, 259). In contrast, GTE claimed that a CSS spends a significant amount of time

on a ladder. (ROA 310). The district court clearly ignored Wall's summary judgment evidence regarding the essential functions of a CSS job. (ROA 391).

Indeed, as the district court recognized, the ADA gives some weight to an employer's definition of the essential functions of a job. (ROA 391). Section 12111(8) provides that, "[f]or purposes of this subchapter, consideration shall be given to the employer's judgment as to what job functions are essential . . . " 42 U.S.C. § 12111(8). However, contrary to the district court's approach, the ADA does not state that *sole* consideration is to be given to the employer's definition of the essential job elements. *See, Id.* The legislative intent regarding this provision of the ADA was for consideration to be given to the essential elements identified by the employer as well as the employee. *See,* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 34 (1990) (An employer's judgement regarding the essential functions of a job is not conclusive and does not raise any presumption that a particular task is essential). By disregarding Wall's summary judgment evidence regarding the essential functions of the job, the district court not only disregarded the legislative intent behind the ADA, but also determined fact issues which should have left for the factfinder at trial. Consequently, the district court erred in ruling that Wall could not establish a *prima facie* case of discrimination under the ADA.

C. Failure to Accommodate

GTE failed to accommodate Wall's disability and ultimately terminated him which constitutes an adverse

employment action for the purposes of establishing a *prima facie* case. (ROA 251-53).

In this case, Wall is an "otherwise qualified" individual; therefore, GTE had a duty to attempt to make reasonable accommodations for Wall. If a person with a disability is "otherwise qualified" to perform his job position then the employer has an obligation to make reasonable accommodations for that individual, unless accommodation would produce undue hardship on the employer. 42 U.S.C § 12112(b)(5). GTE wholly failed to accommodate, or even attempt to accommodate Wall's disability; thus, summary judgment was not proper in this case.

GTE discriminated against Wall by making him perform light duty work and then terminating him allegedly because there was not enough light duty work, rather than allowing him to return to his former CSS position. (ROA 251-52). In reports on the ADA, several congressional committees stated that the employer should not even consider accommodating a disabled employee by transfer to a vacant position until employer has attempted to accommodate him/her in the job that he currently holds. *See*, S. REP. No. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990). Instead of placing Wall in his CSS position on a trial basis as his doctor had recommended, GTE apparently without investigation determined that Wall could not perform his CSS job.

The ADA requires job restructuring when it is reasonable. 42 U.S.C. § 12111(9)(B). Among the considerations which Congress has mentioned are: redelegating

certain assignments; permitting a disabled employee to switch assignments with other employees; and redesigning procedures for accomplishing tasks. S. REP. No. 116, 101st Cong., 1st Sess. 31 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 62 (1990). The ADA specifically provides for part-time or modified work schedules as a "reasonable accommodation". 42 U.S.C.A. § 12111(9)(B). Consequently, GTE's failure to attempt to accommodate Wall establishes material fact issues regarding whether Wall was discriminated against for the purposes of the ADA. Thus, summary judgment was inappropriate.

D. Florence does not apply

The district court erred by analogizing this case with *Florence v. Frank*, 774 F.Supp. 1054 (N.D. Tex. 1991). In *Florence*, the court determined that the plaintiff mail carrier was not able to perform the essential functions of the job, even with reasonable accommodations, because he could only work four hours of an eight hour job, and because his physical limitations prevented him from hand delivery of the mail. *Id.* at 1061-1062. The present case is clearly distinguishable from *Florence*.

In *Florence*, the plaintiff is a "mail carrier." The essential functions of this position are rudimentary; the primary function being, as the district court stated, walking and delivering mail. *Id.* at 1062. It was determined in *Florence*, that the plaintiff was required to deliver the mail for five out of the eight working hours per day and that the route required walking. *Id.* The Florence court also found no alternative means to deliver the mail on this particular route other than by walking the minimum 5

hour route. *See, Florence v. Frank,* 774 F.Supp. at 1062 (plaintiff was not able to perform essential functions of job through any reasonable accommodations and the defendant would not be required to purchase a motorized vehicle).

In this case, the essential functions of the CSS job are not so inflexible. As is discussed in the "Essential Elements" section above, there are many disputed questions of material fact concerning what is required of a CSS, including whether the job could be performed in 4 hour shifts. Unlike the employee in *Florence,* Wall specifically presented summary judgment evidence that an 8 hour shift was not an essential element of his CSS job and that the job could be performed in a 4 hour shift. (ROA 251).

Wall also presented summary judgment evidence which establishes material fact issues regarding alternative means by which he could have performed his CSS job without causing undue hardship on GTE. Specifically, Wall, who had been performing the CSS job prior to his injury and is thus qualified to testify regarding the essential functions of the job, states in his affidavit that he could have performed his CSS duties, despite his restrictions, during 4 hour shifts. (ROA 251-52). Also, other GTE workers had in the past performed the CSS duties in 4 hour shifts. (ROA 259).

Also, in direct contrast to the present case, the plaintiff in *Florence* was permitted to return to work and was allowed to attempt to perform the essential functions of his job. *Florence v. Frank,* 774 F.Supp. at 1058. This form of accommodation (allowing a disabled employee to attempt the essential functions of the job which he currently holds

before he/she is transferred to a new, vacant position) complies with the legislative intent behind the ADA. *See*, 56 Fed. Reg. 35,744 (1991). In contrast to Florence and the legislative intent, GTE made no attempt to accommodate Wall in his CSS job. (ROA 251-52). Thus, *Florence* is not dispositive.

In light of the numerous fact issues in this case regarding the essential elements of the CSS job and the opportunities for reasonable accommodations to have been made by GTE; the district court erred in granting summary judgment on Wall's ADA discrimination claim. (ROA 395).

ISSUE NO. 3 (RESTATED)

The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of discrimination under the Texas Commission on Human Rights Act. (ROA 393). Was this error?

The district court granted summary judgment on Wall's discrimination claim brought under the TCHRA on the ground that Wall failed to show that he was able to perform his CSS job despite his disability. (ROA 393). In making this ruling, the court relied on the same reasoning used in its analysis of Wall's ADA discrimination claim. (ROA 393).

A. Wall is "Disabled"

Although the court indicated it was unsure whether Wall was disabled under the TCHRA (ROA 393), the

summary judgment evidence establishes that he is "disabled" for the purposes of the TCHRA. Under the TCHRA, "disability" is defined as follows:

> . . . a mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment.

Tex.R.Civ.Stat.Ann. Art.5221k, section 2.01(4) (Vernon 1987)[4]. In cases interpreting the similar "limits at least one major life activity" language found in the federal Rehabilitation Act, courts have held that such a determination is best suited to a "case-by-case determination". *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328, 1342 (S.D. Tex. 1987). Courts have held that relevant to such a determination are the "number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual job expectations and training." *Id., citing, Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986).

Wall has permanent restrictions which effect [sic] his ability to perform various lifting, carrying and standing functions. (ROA 209). Wall's restrictions also limit him to 4 hour work shifts. (ROA 209). The fact that Wall's restrictions limit in his employment options and restrict his mobility establish that he is "disabled" under the TCHRA.

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[4] Tex. Rev. Civ. Stat. Ann. Art. 5221k (Vernon 1987) has been repealed and recodifed [sic] in Sections 21.001-.306 of the Texas Labor Code. The recodification did not change the substantive law regarding the provisions relevant to this case.

B. Wall is "Qualified"

The district court reasoned that Wall's disability prevented him from reasonably performing his CSS job, and that consequently his TCHRA claim must fail. (ROA 393). Under the TCHRA, a discrimination case, such as Wall's, brought "because of disability" or "on the basis of disability" refers to:

> discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

Tex.R.Civ.Stat.Ann. Art.5221k, section 1.04(b). The case law is scarce in this area of the law; however, the court in *Elstner v. Southwestern Bell Telephone Co.*, construed the above language of the TCHRA to be similar to the "otherwise qualified" requirement of Section 504 of the Rehabilitation Act of 1973. *Id.* at 1346. In *Elstner,* the court noted that in an employment setting, an "otherwise qualified" person is able to perform "the essential functions" of the job in question[5]. *Id.*

As previously discussed in the "Essential Elements" section in the ADA portion of this brief, there are sharp fact disputes regarding whether Wall is able to perform the essential elements of his CSS job. Thus, there are material fact issues regarding whether Wall was an "otherwise qualified" individual, and whether he was discriminated against because of his disability for purposes

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[5] In *Elstner,* the court found that an employee's knee injury impaired his ability to reasonably perform his job which required climbing telephone poles. *Id.*

of the TCHRA. It was error to grant summary judgment on Wall's TCHRA claim.

ISSUE NO. 4 (RESTATED)

The district court disregarded the abundant summary judgment evidence which established material fact issues regarding whether Wall was discriminated against based on his disability or his workers' compensation claim when he was removed from the workplace and terminated. (386-87, 392, 394). Was this error?

Wall presented ample summary judgment evidence in this case which establishes material fact issues regarding whether GTE's stated reason for removing Wall form [sic] light duty was a pretext for discrimination. (ROA 70, 207-08, 251-54, 259, 261). The district court ignored this evidence and disposed of the entire case via summary judgment on the grounds that Wall failed to establish a *prima facie* case of discrimination under either the ADA or the TCHRA, and failed to establish the required "causal connection" for his article 8307c claim. (ROA 385, 388-89, 392-93). This was error because, as previously discussed, there are material fact issues as to Wall's ability to present a *prim* [sic] *facie* case of discrimination and retaliation, and there are material fact issues regarding whether GTE's stated reasons for its adverse employment actions were a pretext.

Discrimination: Removal from the Workplace

GTE argued in its motion for summary judgment that Wall's discrimination claims must fail because he was

allegedly removed from light duty work based on the seniority system in the CBA. (ROA 66). Here, GTE faces serious credibility problems. Specifically, GTE claims that there was only enough light duty work for two employees, and that Chlebowski and Ellerbee were allegedly retained over Grimes and Wall based on seniority. (ROA 70, 207). In actuality, Chlebowski was released to regular duty prior to the time Wall was removed from light duty; thereby, leaving a light duty position open for Wall, the next most senior employee. (ROA 70, 252). Thus, by GTE's own admission, Wall should not have been removed from light duty in September 1992. This raises genuine issues of material fact regarding GTE's credibility and the true reason Wall was removed from light duty, i.e., terminated. The Fifth Circuit has held that discrepancies in testimony raise credibility issues which are properly for the factfinder to weigh. *See, Dibidale of Louisiana, Inc. v. American Bank & Trust Co., New Orleans*, 916 F.2d 300, 307 (5th Cir. 1990), *citing Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980). Indeed, the *Dibidale* court held that "credibility assessments are not fit grist for the summary judgment mill." *Id.* at 307. Thus, in light of GTE's credibility problems, summary judgment was not proper in this case.

The district court ignored the summary judgment evidence presented by Wall to support his claim that he was removed from the workplace for discriminatory reasons rather than for the reason proffered by GTE, i.e., that Wall was removed from the workplace based on seniority. (ROA 70, 207, 251-53, 392). GTE's claimed seniority-based right to light duty has been controverted by Wall and by GTE's own admissions. Specifically, because Chlebowski

was released to full duty prior to September 17, 1992 there was an available light duty position which should have been filled by Wall, the next most senior employee. (ROA 70, 207, 252). Also, after Wall was removed from light duty, the issue of seniority was not a factor in GTE's requirements for his being able to return to work, but rather he was told that he would have to have his restrictions (which were permanent) removed before he could return to work. (ROA 251-52). Also, GTE does not claim that seniority factored into another employee being placed on light duty instead of Wall after Wall was removed from light duty. (ROA 253). Thus, contrary to GTE's claim that Wall was removed from the workplace based on seniority, Wall's seniority status apparently had nothing to do with GTE's refusal to place him on light duty. Indeed, Wall's seniority, if that were truly being applied, would have qualified him for the available light duty positions.

In light of Chlebowski's return to regular duty and another employee being placed on light duty instead of Wall, the seniority issue only further substantiates Wall's discrimination claims and the pretextual nature of GTE stated reasons for the adverse employment actions taken against Wall. Thus, summary judgment is not proper on the seniority issue.

Discrimination: Wall was Terminated

GTE also claimed that Wall was not discriminated against because he was not terminated, but rather he abandoned his job. (ROA 65). Contrary to GTE's claim, Wall did not abandon his job. (ROA 253). It was GTE who

informed Wall that he would not be returning to work, i.e., that removal of his permanent restrictions was required. (ROA 252). As previously stated, Wall's restrictions were permanent. (ROA 209, 251). Also, Wall was never given the chance to return to his CSS job on a "trial basis" as his doctor released him to do, and thus never had his restrictions altered. (ROA 251-52). Consequently, it is not surprising that Wall has never presented a full medical release to return to work. There are genuine issues of material fact regarding whether GTE's refusal to allow Wall, an employee with permanent restrictions, to return to work until he had a full duty release constituted termination and discrimination. Furthermore, although more light duty apparently became available after Wall was removed from light duty, Wall was not contacted about the position. (ROA 253). This also establishes GTE's discriminatory animus.

GTE also argues that Wall abandoned his job because he allegedly failed to notify GTE of his move to Angleton, Texas. (ROA 56, 65). This claim is not true. Prior to his move, Wall specifically informed Gina Logan that he was moving to Angleton, Texas. (ROA 253). In fact, prior to his move, Gina Logan told Wall to try and bid on some jobs in the Angleton area. (ROA 253, 261). Wall left a forwarding number on his telephone. (ROA 253). Also, after his move, Wall received his supplemental benefit checks from GTE (ROA 253); therefore, GTE was aware of Wall's whereabouts or at least there are material fact issues on this point.

In light of the above, there are genuine issues of material fact regarding the illegitimacy of GTE's stated reasons for its adverse actions against Wall, and whether

GTE discriminated against Wall in violation of the ADA, the TCHRA and article 8307c. Therefore, it was error to grant summary judgment in this case.

ISSUE NO. 5 (RESTATED)

The district court held that the Plaintiff-Appellant failed to establish a *prima facie* case of retaliation under the Americans with Disabilities Act. (ROA 386-87, 394). Was this error?

The district court held that Wall failed to establish a *prima facie* case of retaliation under the ADA. (ROA 386). The court noted that the following was required to establish a *prima facie* case of retaliation: (1) a showing that the employee engaged in a protected activity; (2) an adverse employment action was taken against the employee; (3) and that a causal connection exist between the adverse employment action and the participation in the protected activity. *See,* ROA 386, *citing, Harmer v. Virginia Elec. and Power Co.,* 831 F.Supp. 1300, 1308 (E.D. Va. 1993); *See also, Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 42 (5th Cir. 1992) (elements of a *prima facie* case of retaliation under Title VII which are applicable to 5221k claims[6]). In this case, Wall filed charges of discrimination with he (the) EEOC against GTE and requested that his disability be accommodated by placing him in his former position on a trial basis. (ROA 251-54). Therefore, Wall participated in a protected activity. Also, Wall was denied reasonable accommodations for his CSS job and was ultimately eliminated from the workforce. (ROA 251-53). Thus, Wall

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[6] *See, Eckert v. Frostex Foods, Inc.,* 802 S.W.2d 70 (Tex. App.-Austin 1990, no writ)

satisfies the first two prongs of the *prima facie* case for retaliation.

Wall also satisfies the "causal connection" element of the *prima facie* case. Specifically, Wall filed discrimination charges with the EEOC prior to his release to return to work in July 1992 (ROA 250, 257). After Wall was released to return to work, Wall was not permitted to return to his former CSS job, either with or without accommodation. (ROA 251). Instead, Wall was placed on light duty and was then eliminated from the workplace allegedly because there was not enough light duty work for 4 employees. (ROA 252). This establishes material fact issues regarding whether there is a causal connection between the filing of the discrimination charges and the refusal to accommodate, and Wall's subsequent termination. Thus, the district court erred in holding that Wall failed to establish a *prima facie* case of retaliation. (ROA 386).

ISSUE NO. 6 (RESTATED)

The district court held that even if Plaintiff-Appellant established a *prima facie* case of retaliation under the Americans with Disabilities Act, the summary judgment evidence was not sufficient to establish a genuine issue of material fact that the Defendant-Appellee's stated reasons for its employment decisions were a pretext for discrimination. (ROA 386-87). Was this error?

In a footnote, the district court stated that even if Wall could establish a *prima facie* case of retaliation under the ADA, he still would not survive summary judgment

because he failed to adduce evidence to show that GTE's stated reasons for the adverse employment actions were a pretext. (ROA 386-87). The summary judgment evidence presented by Wall establishes material fact issues regarding pretext.

In most instances, claims of employment discrimination involve a three-step proof analysis. A plaintiff must establish a prima facie case of discrimination. This is followed by the employer defendant's attempt to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Finally, should defendant be successful, then the plaintiff is allowed to prove, directly or indirectly, that the explanation put forth by defendant is a pretext for discrimination. *See St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See also United States Postal Serv. v. Aikens,* 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). It has been held that the overall pattern of proof in a retaliation case should follow the general pattern set out in *McDonnell Douglas. See De Anada v. St. Joseph Hosp.,* 671 F.2d 850 (5th Cir. 1982).

As previously discussed in this brief, GTE has serious credibility problems with respect to its stated reasons for the adverse employment actions taken against Wall. (See, credibility discussions under ISSUE NO. 1 (f) and ISSUE NO. 4). Thus, GTE has failed to meet its burden of establishing a legitimate nondiscriminatory reason for its

refusal to accommodate Wall and Wall's removal from light duty.[7]

If however it is determined that GTE met its burden of production, Wall must then be given the opportunity to show that the reason asserted is pretextual. *See, St. Mary's Honor Center v. Hicks,* 113 S.Ct. at 2747-50. Justice Scalia writing for The United States Supreme Court in *Hicks* reasoned that "[t]he factfinder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional discrimination." *Id.* The Supreme Court in Hicks further held that "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required.*' " (emphasis in original) *Id.*

The close proximity in time between Wall's post March 1992 charge of discrimination and the July 1992 refusal to accommodate and September 1992 termination establishes material fact issues regarding whether Wall was retaliated against by GTE. The Fifth Circuit has held that the proximity in time between the participation in

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[7] It has been held that "legitimacy" connotes more than a requirement that the asserted reason have some factual basis, but it must be "reasonable" under the circumstances. *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792. "Nondiscriminatory" suggests that the reason or rule invoked by the employer to justify its action must be equally applied. The mere articulation of an explanation for a defendant's action is of no legal force unless it meets the further conditions of clarity and specificity set forth above.

the protected activity and the adverse employment action may be considered when determining whether retaliation occurred. *See, Shirley v. Chrysler First, Inc.*, 970 F.2d at 44 (14 month lapse in time between participation is the protected activity and the adverse employment action did not preclude liability for retaliation).

This Circuit has also recognized that evidence of an employer's hostile reaction to an employees complaints of discrimination may be used to support a claim for retaliation. *See, Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994). In this case, GTE displayed a hostile attitude toward Wall when it refused to accommodate him and then removed him from light duty. (ROA 251-52). Wall's removal from light duty was especially hostile because the reason given to Wall for the removal was unfounded. (ROA 252). Had GTE truly followed its alleged practice of seniority based assignment to light duty, then Wall would have been placed in the light duty position left vacant by Jim Chlebowski. (ROA 252).

Thus, it is clear from the summary judgment evidence that if GTE followed its seniority system, Wall should not have been removed from light duty on September 17, 1992. This is further evidence of the pretextual nature of GTE's stated reason for eliminating Wall. *See, Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991) (if it appears to the factfinder that the employer seems to have made a large mistake regarding an employment decision, then the question arises as to whether the decision was a mistake at all, or rather is a pretext for discrimination); *See also, Brown v. Gerrard Mfg. Co.*, 634 F.2d 273 (5th Cir. 1981) (when a defendant

departs from its usual practices or policies when disciplining or taking action against the plaintiff, this raises questions on the issue pretext).

There are material fact issues regarding whether Wall was retaliated against in violation of the ADA; therefore, the district court erred in granting summary judgment on this point.

CONCLUSION

The summary judgment evidence in this case is sufficient to defeat summary judgement as to each of Wall's claims. A genuine issue of material fact exists regarding whether Wall has established a *prima facie* case of discrimination and retaliation under the ADA, the TCHRA and article 8307c, and/or whether GTE's articulated reason for termination was a pretext for discrimination. Most importantly, GTE's stated reasons for termination are not credible and are not worthy of belief, and reasonable fact finder could infer that Wall was discriminated and retaliated against in violation of the ADA, the TCHRA and article 8307c. Thus, it was error to grant summary judgment in this case. (ROA 395).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served on opposing counsel as follows:

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via certified mail, receipt no. P 987 188 464, on this the 21st day of September, 1994.

/s/ John E. Wall, Jr.
John E. Wall, Jr.

APPENDIX D

APPEAL NO. 94-10612

IN THE UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

MICHAEL R. WALL,
APPELLANT-PLAINTIFF,

V.

GTE SOUTHWEST INCORPORATED,
APPELLEE-DEFENDANT.

BRIEF FOR DEFENDANT-APPELLEE
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U.S. COURT OF APPEALS
FILED
NOV 25 1994

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CERTIFICATE OF INTERESTED PERSONS

The following is a complete list of all interested parties, including counsel of record in this action, as required by Local Rule 28.2.1.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from a final summary judgment rendered by the United States District Court for the Northern District of Texas, Dallas Division, United States District Judge Barefoot Sanders.

STATEMENT OF THE ISSUES

Did the district court err in holding that Wall failed to satisfy his summary judgment burden on the existence of a causal connection between a protected activity under the Americans with Disabilities Act of 1991 or the Texas Workers' Compensation statute and negative employment action?

Did the district court err in holding that Wall failed to establish that he was a qualified individual under either the American with Disabilities Act of 1991 or the Texas Commission on Human Rights Act?

Did the district court err in holding that Wall failed to establish that he was discriminated against under the Americans with Disabilities Act of 1991 or the Texas Commission on Human Rights Act, or that the reasons given by GTE for its actions were pretexts for discrimination?

STATEMENT OF THE CASE

Procedural History

Wall sued GTE in the 162nd Judicial District, Dallas County, Texas. In his original petition, Wall asserted a

claim of employment discrimination and retaliation under the Texas Commission on Human Rights Act ("TCHRA"), formerly Tex. Rev. Civ. Stat. Ann. art. 5221k, Section 1.01, *et seq.* (Vernon 1987); now Sections 21.051 *et seq.*, Texas Labor Code (Vernon Supp. 1994).

GTE removed the case to the Northern District of Texas, asserting that Wall's claims were preempted by federal labor law. No Motion for Remand was filed by Wall.

After removal, Wall amended his Complaint to assert claims under the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1992) (recently re-codified in the Texas Labor Code, Vernon Supp. 1994, but not changed), and the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101 *et. seq.* (West Supp. 1994). In his Amended Complaint, Wall does not expressly state a claim of retaliation under either the TCHRA or the ADA. Record at 37-39. He does, however, allege that GTE "discriminated against him on account of his . . . workers' compensation proceeding," which could be construed to be a retaliation claim under the Texas Workers' Compensation Act. Record at 43.

GTE filed a Defendant's Motion for Dismissal or Summary Judgment with Supporting Brief (Defendant's Motion for Summary Judgment), asserting that Wall should take nothing on his claims because (1) they were preempted by Section 301 of the Labor-Management Relations Act; or (2) he failed to state claims upon which relief could be granted under the ADA, TCHRA or workers' compensation statute.

Wall filed a response to the Motion, and GTE filed a Reply. On May 31, 1994, the district court entered summary judgment in GTE's favor on all of Wall's claims. Record at 395. The district court rejected GTE's preemption argument, but found that Wall had failed to meet his summary judgment burden on all claims of retaliation and discrimination under the TCHRA, ADA and workers' compensation statute. Record at 375-394.

Wall filed a Motion for Rehearing/New Trial, which was denied on June 14, 1994. Record 416. Wall filed a timely appeal of the summary judgment. Record 417.

Statement of Facts

1. Plaintiff Michael R. Wall ("Wall") was employed by GTE as a Customer Service Specialist beginning on September 13, 1982. Record at 69. A CSS's tasks include traveling to GTE customers' locations to perform repairs on telephones and telephone cables, both aerial and buried. Record at 69.

2. At all relevant times, the terms and conditions of Wall' employment were governed by the August 16, 1992 edition of the Agreement of Recognition, Bargaining Procedure and Operating Contract between GTE Southwest Incorporated and Communications Workers of America ("Collective Bargaining Agreement"). Record at 69-70.

3. On March 6, 1992, Wall allegedly injured his back and left work on workers' compensation. Record at 69, 190-191. On May 26, 1992, Wall's immediate supervisor, David Debusman (whom Wall claims harassed him about his workers' compensation status) transferred out of

Wall's group to a completely different department. Record at 311. He took no further employment action with regard to Wall. *Id.*

4. Wall did not receive a release to return to work from the March 1992 injury until July 24, 1992. Record at 207, 209; 69, 192. The release stated that Wall was only to work half-time with restrictions on lifting, carrying, standing and sitting that did not meet the capacity required for his job. *Id.* Accordingly, GTE approved light duty for him, although it is not required by the Collective Bargaining Agreement. Record at 207-208, 69-70. On August 2, 1992, another doctor's statement was delivered to GTE, saying that Wall was not to return to full duty for at least an additional four weeks. Record at 207, 211-212.

5. During this time frame of September, 1992, GTE had a total of four men performing light duty work in the Plano office. Record at 207-208, 69-70. A determination was made that there was simply not enough light duty work to justify keeping four people on light duty, and Wall and a co-employee, Robert Grimes, were told that they were to return to workers' compensation status. *Id.* Wall and Grimes were the two least senior of the four men. *Id.* The Collective Bargaining Agreement provides that most employment decisions are to be governed by strict seniority, and this decision was in conformity with the Agreement. Record at 69-70.

6. Wall was never medically released to full duty after he was put back on workers' compensation on September 17, 1992. Record at 207-208; Exhibit 3 to Defendant's Motion for Summary Judgement (filed between pp. 197 and 198 of the Record). He never provided a doctor's

release, nor did he notify GTE that he wished to return to work. *Ibid.* Wall moved to South Texas and did not even notify his supervisor. Record at 207-208.

7. On June 14, 1993, GTE sent Wall a letter informing him that his benefits had run out, and that he should contact his supervisor to notify him of his desire to return to work, request a six-month leave of absence, or resign. Wall did not respond. *See* Exhibit 3 to Defendant's Motion for Summary Judgement, filed between pages 197 and 198 in the Record. On August 12, 1993, a follow-up letter was sent, stating that if Wall did not respond by August 27th, it would be assumed he had discontinued his employment. *Id.* To this letter, Wall's lawyer responded, saying that it would be "impossible" for Wall to return to his job. Wall did not request a leave of absence, although he had the option to do so. Exhibit 69-70.

8. The Collective Bargaining Agreement contains a provision granting GTE the absolute right to determine the size of the work force, and to make adjustments in the size of the work force as are necessary to insure profitable operation. Record at 125.

SUMMARY OF THE ARGUMENT

GTE's summary judgment evidence established the following facts:

1) The restrictions on Wall's July 1992 medical release did not enable him to perform the essential functions of a CSS – accordingly, Wall is not a qualified individual with a disability under either the ADA or TCHRA.

2) The applicable Collective Bargaining Agreement did not provide for light duty work, but did give management the right to determine the size of its workforce, and the right to control the assignments of its workers. Wall was released from light duty on September 17, 1992 based upon the needs of the business and his low seniority, criteria established by the governing Collective Bargaining Agreement. Courts have not required employers to accommodate employees where the accommodation would violate the Collective Bargaining Agreement.

3) Wall was allowed to perform half-day light duty work after he was released with time and physical restrictions in July 1992. After he was placed back on workers' comp status in September of 1992, and despite at least two written contacts by GTE, Wall never indicated an interest in returning to work, much less requested an accommodation of a disability, if any. In fact Wall, through his lawyer, notified GTE that he would not be returning. These facts negate any discriminatory or retaliatory treatment, and establish that Wall abandoned his job voluntarily.

In response, Wall submitted his own Affidavit, along with the declarations of several individuals. These statements are largely inadmissible, and, in any event, do not establish a genuine issue of material fact on Wall's claim that he was

1) "disabled" under the ADA and TCHRA;

2) capable of performing the essential functions of his job with or without accommodation;

3) discriminated against because of his alleged disability, i.e. by failure to provide him with reasonable accommodation; or

5) retaliated against because he had filed a workers' compensation claim or because he had filed an EEOC complaint or allegedly sought reasonable accommodation.

These elements are critical to Wall's case, and he clearly carries the burden on them. Wall adduced no competent summary judgment evidence sufficient to raise an issue on any of these elements.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT SUMMARY JUDGMENT ANALYSIS.

The district court correctly stated in its opinion that a summary judgment movant, to be successful, must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the nonmovant's case. Record at 381, *citing Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 82 (1992). This completed, the summary judgment movant does not have to negate his opponent's claims or produce evidence affirmatively showing an absence of factual issues, but may rely on his opponent's failure to adduce evidence supporting the essential elements of his claims. *International Association of Machinists*

& Aerospace Workers v. Intercontinental Manufacturing Company, 812 F.2d 219, 222 (5th Cir. 1987). The burden is on the nonmovant to "come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586-587, 106 S.Ct. 1348, 1356 (1986) (emphasis in original). It is not enough for the nonmovant to rely on the allegations in his pleadings – he must produce specific evidence to support his claims. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256-257, 106 S.Ct. 2505, 2514 (1986).

GTE specifically objected to a large portion of Wall's summary judgment evidence. *See* Exhibit A to Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss or for Summary Judgment ("Defendant's Reply"), Record at 306-309. Many of the testimonial statements submitted by Wall were frankly inadmissible because they are hearsay. *Id.* As the district court correctly noted, much of the evidence adduced by Wall was speculative, irrelevant, and without a foundation of personal knowledge. Record at 386, n.6, and p. 390, n. 8 and p. 394. At least one of Wall's summary judgment "affidavits" had to be disregarded by the district court because it failed to satisfy the requirements of 26 U.S.C. § 1746. Record at 390. In short, the district court judged Wall's summary judgment evidence "scanty" and insufficient to create a material fact issue on any of his claims. Record at 394.

II. IN RESPONSE TO GTE'S MOTION FOR SUMMARY JUDGMENT, WALL FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT ON AT LEAST ONE CRITICAL ELEMENT OF EACH OF HIS CLAIMS FOR RETALIATION AND DISCRIMINATION UNDER THE TEXAS WORKERS' COMPENSATION ACT, THE ADA AND THE TCHRA.

A. The district court correctly found that Wall did not present a prima facie case of retaliation under either the ADA or the Texas Workers' Compensation Act.

Under both the Texas Workers' Compensation Act and the ADA, Wall must establish a causal connection between the negative employment treatment he alleges he sustained at the hands of GTE[1] and his protected conduct.[2] Because the causal connection is an element of

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[1] As GTE's summary judgment evidence establishes, Wall was not discharged from his employment; rather, he did not return to work, and failed to respond to written inquiries from GTE about his intentions to return to work, seek a leave of absence or resign. It was not clear from Wall's pleadings or summary judgment evidence what exactly he claimed were the negative actions. For purposes of GTE's summary judgment motion, the district court assumed that the negative employment actions alleged by Wall were: (1) removing him from light duty work on September 17, 1992; (2) placing him back on workers' compensation status; and (3) considering him to have abandoned his job. Record at 385, 386.

[2] Again, it was unclear exactly what Wall claimed was his "protected conduct" under the Texas Workers' Compensation Act and the ADA. Wall did not expressly allege ADA in his Amended Complaint. Record at 37-39. The district court presumed, for purposes of the summary judgment motion, that protected acts would include Wall's filing of a workers' compensation claim, and his filing of an EEOC charge and alleged

his prima facie case, Wall must establish the element in order to avoid summary judgment. This, he failed to do.

1. Wall presented no evidence connecting his workers' compensation claim with actions taken by GTE.

Although an employee-plaintiff can prevail on a claim that he was terminated in retaliation for filing a workers' compensation claim without showing that it was the *sole* cause, the employee must at least show that the filing of the claim was a determining factor in the discharge. *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 265 (5th Cir. 1991), *reh. denied., cert. denied,* 112 S.Ct. 1956, *reh. denied,* 112 S.Ct. 3059 (Affirming a summary judgment for the defendant-employer).

Wall asserts that he presented competent evidence on several different factors supportive of his claim of a causal connection. *See* Appellant's Brief, pp. 12-15. Wall alleges that GTE's conduct toward him was retaliatory because:

> 1. GTE representatives Gina Logan and Douglas Patton indicate in their summary judgment affidavits that they were aware that Wall had sustained a workers' comp injury;
>
> 2. Wall's former supervisor, David Debusman, "harassed, humiliated and ridiculed" Wall and fellow employee Robert Grimes for filing workers' compensation claims;

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request for reasonable accommodation under the ADA. These acts are certainly contemplated by the applicable statutory provisions (Tex. Labor Code Sec. 451 and 42 U.S.C. § 12203(a)).

3. Debusman's pay raises were directly linked to the number of on-the-job injuries in his department;

4. GTE had a company policy discouraging the reporting of accidents and injuries;

5. GTE forced Wall to return to work on light duty rather than at his CSS job;

6. GTE removed Wall from light duty, which was available;

7. Wall believes he was retaliated against;

8. GTE says that it removed Wall from light duty because it only had enough light duty work for two, more senior employees, but one of the two senior employees had already been released to full duty and was no longer on light duty;

9. Wall was told he could not return to his CSS job until he received a release for full duty, or additional light duty became available;

10. Gina Logan said that she didn't know where Wall had moved to, when Wall says that he told her; and

11. Gina Logan says Wall spoke to her about returning to work, but Wall says he spoke to Union Steward Barbara Hanson.

Most of these allegations are completely unsupported by any competent summary judgment evidence. For example, Wall's allegations that his former supervisor, Dave Debusman made derogatory statements about his injury and discriminated against those with workers' comp claims because his pay raises were linked to on-the-job injury levels are "supported" only by the Declarations

of Keith Erwin, Donald Ingram, John McBride, in which Wall's former co-workers merely say that they agree with certain of the statements made by Wall in a letter to GTE Corporation's CEO Chuck Lee. Record at 262-278. As GTE pointed out in Exhibit A to its Defendant's Reply, and as the district court noted in its opinion, this evidence is hearsay, lacks personal knowledge and is speculative. Record at 306-309, 386, 390. Further, since it is undisputed that Debusman transferred out of the department four months before any allegedly negative action was taken with regard to Wall, this evidence is irrelevant to the cause connection. Record at 311.

Wall's new allegation that GTE had a policy discouraging the reporting of injuries is absolutely unsupported. This allegation was not even mentioned in Wall's district court filings. Wall appears to be extrapolating this accusation from his unsupported allegation that Debusman's pay raises were based in part upon injury minimization.[3] See Appellant's Brief, pp. 14-15. This wild inference based upon speculation does not constitute evidence sufficient to defeat summary judgment.

Wall misstates another fact when he says he was "forced" to return to light duty, rather than to his CSS job. Given his physician's refusal to release him to full duty,

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[3] Even if the statements attributed by Debusman about his pay raises are true, it is clear that on-the-job injuries would have been only a part of the basis for determining his raise. In his Affidavit, Wall's co-worker Keith Huyck states that Debusman said his pay raise "would be determined by us meeting the company objectives such as tel-cel, accidents (vehicle and general liability), on-the-job injuries, and repeated trouble reports." Record at 279.

which Wall does not dispute, it is clear that GTE could not have put Wall back to work as a CSS. Wall presents absolutely no evidence that he ever disputed his assignment to light duty. Further, he inconsistently argues that he should have been assigned light duty.

Even if Wall's allegations were true, however, they do not establish the required causal connection between his claim and GTE's conduct. In a recent decision, this Court reviewed facts similar to those alleged by Wall, and reversed and rendered in favor of the defendant-employer. *See Parham v. Carrier Corporation*, 9 F.3d 383 (5th Cir. 1993).

In *Parham*, the employee-plaintiff claimed a retaliatory discharge under the Texas workers' compensation statute because:

1) his employer's officials knew he had filed a workers' compensation claim;

2) his employer's motive in firing him was to reduce comp claims;

3) his employer had retaliated against others who had filed claims;

4) his employer's absenteeism policy was not neutrally applied; and

5) he was physically qualified to return to work for his employer.

9 F.3d at 387. This Court found, first, that the employee had presented no evidence that anyone involved in his termination had actual knowledge of his comp claim. *Id.* In the instant case, Wall points out that Douglas Patton, a labor relations administrator, and Gina Logan, a former

supervisor, appear to have been aware of his filing of a claim. Neither of these individuals took a negative employment action with respect to Wall. Wall does not claim that Patton ever took any action with respect to his employment, and the only action Logan took was to place Wall *on* light duty when he presented his physician's statement, and then relieve him of light duty when it became apparent that there was only enough for the two most senior employees, Ellerbee and Chlebowski. Record at 207-208.

Until June 14, 1993, when Facilities/Outside Plant Supervisor M.F. Fannin sent Wall a letter requesting him to state his intentions regarding return to work, leave of absence or resignation, no further action with regard to Wall was taken. To the extent Wall claims that the two letters from Fannin in June and August of 1993 constituted a "discharge," which GTE strongly contests, then (at a minimum) he must show that Fannin knew he had made a workers' comp claim. This he does not do. Even if the summary judgment evidence established that Fannin did know of the comp claim, that knowledge would not be enough to establish a causal connection. "Considerable additional evidence of retaliatory animus" is required to support such a connection. *Parham*, 9 F.3d at 387. Other than his incompetent evidence of Debusman's "harassment," Wall provides no evidence of such animus; even if it existed as to Debusman, Debusman had transferred out of Wall's group in May of 1992, and had not asserted any authority over Wall's employment from that time forward. Record at 311. Accordingly, his personal animus, if any, is irrelevant. 9 F.3d at 387. Only the behavior and statements of GTE personnel who had the authority to,

and made the allegedly negative decisions regarding Wall are relevant and admissible. *See, e.g., Breneman v. Kennecott Corporation*, 799 F.2d 470, 473 (9th Cir. 1986); *Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 792 (W.D. Okla. 1993), *aff'd* 36 F.3d 939 (10th Cir. 1994) (holding that evidence of derogatory remarks by an employee-plaintiff's supervisor was irrelevant when the supervisor did not affect employment decisions and entering summary judgment for the employer.)

Wall's allegation that GTE exhibited hostility towards workers' compensation claims by basing supervisors' pay raises in part upon on-the-job injuries incurred (specifically, Debusman's), even if true, does not support the causal connection. As this Court points out in the Parham decision, a generalized desire to reduce compensation claims – in itself – is not impermissible. 9 F.3d at 387.

Wall's claim that the retaliatory causal connection is supported by his own statements that he believed that he was retaliated against flies in the face of logic. The inherent unreliability of such self-serving statements was recognized by this Court in *Pope v. MCI Telecommunications*, when it held that there must be some basis for the causal connection besides the employee-plaintiff's subjective belief. 937 F.2d at 265, n. 33 (citations omitted). It is hard to imagine a retaliatory discharge case where the plaintiff would not believe that he had been retaliated against; in fact, the case Wall cites in support of this surprising proposition does not vouch for the reliability of such evidence. The court in *General Electric v. Kunze* merely mentions in passing that the employee-plaintiff testified that he believed he had been performing acceptably and that his discharge might have resulted from his injury

and pursuit of his workers' compensation claim. 747 S.W.2d 826, 830 (Tex. App. – Waco 1987, writ denied). The employee-plaintiff's subjective belief was only a small part of a great amount of objective evidence of the employer's retaliatory intent.

Wall's claim that he was removed from light duty when there was actually light duty available is unsupported by the evidence. Gina Logan clearly testified that four employees were working light duty, Bo Ellerbee, James Chlebowski, Wall and Robert Grimes. Record at 207. She placed Wall and Grimes back on workers' comp status when it became clear that she had too many employees working light duty. *Id.* She allowed the two most senior, Ellerbee and Chlebowski, to continue working light duty tasks. *Id.* Wall now claims that Chlebowski was actually released to full duty on September 14, 1992. Appellant's Brief, pp. 6, 29-30; Record 252. Wall's evidence of this assertion, as stated by Wall in his Affidavit, is

> I have since learned from Jim Chlebowski at GTE that Chlebowski was actually released to return to full duty work on or about September 14, 1992.

Record, 252. As GTE pointed out in its Reply, and as the district court noted, this evidence is hearsay and inadmissible. In addition, it is inconclusive. There is no evidence that GTE was ever notified that Chlebowski was ever "released to return to full duty work" if he indeed was. Clearly, that fact is important to Wall's claim that GTE intentionally and retaliatorily denied him light duty work.

2. Wall presented no evidence connecting an EEOC complaint with actions taken by GTE.

Wall's claim that he was retaliated against in violation of the ADA for filing an EEOC complaint must also fail. Wall's claim fails because he adduced absolutely no evidence of his filing of an EEOC complaint before he was released from light duty on September 17, 1992, which is the primary negative act he claims. The only EEOC complaint in the summary judgment evidence is the one he filed *after* he was removed from light duty and placed back on workers' comp status. Record at 254-258. As far as GTE's subsequent actions are concerned, there is no summary judgment evidence even suggesting that M.F. Fannin, who sent Wall the letters requesting that he state his intentions, knew about the September EEOC complaint.

3. In any event, GTE presented competent evidence of non-retaliatory, non-discriminatory reasons for its actions regarding Wall, and Wall did not challenge those reasons.

As the district court noted in its opinion, even if Wall had established a prima facie case of retaliation under the ADA or Texas Workers' Compensation Act, summary judgment for GTE was still warranted because Wall did not raise any evidence suggesting that GTE's reasons for assigning him to light duty, removing him from light duty, and considering him to have abandoned his job were pretextual. Record at 386, n. 7. An employer meets its burden of production in employment discrimination cases by proffering admissible evidence of an explanation

that would be legally sufficient to justify a judgment for the employer. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (citations omitted). Then, the employee-plaintiff must tender evidence that would lead a reasonable jury to conclude that the employer's reasons are a pretext for discrimination. 5 F.3d at 958.

GTE's summary judgment evidence established that, on September 17, 1992, Wall was released from "light duty" work and told to return to workers' compensation status because GTE could no longer justify having four men, whose regular jobs were outside repair and technical work, performing light duty in the Plano facility. Light duty work is not required by the Collective Bargaining Agreement. The provisions governing the situation with Wall's light duty work are Article XXVI, Sections 1.1 and 2.1, which grant to GTE the right to establish work schedules and to control the size of the work force. Record at 125. Wall was the least senior of the four men who were performing light duty work when GTE decided to put two men back out on workers' compensation. The Collective Bargaining Agreement makes seniority the deciding factor in matters affecting assignment of hours, among other things. Record at 111. As stated earlier, Wall's attempt to show that this justification is pretextual fails because his summary judgment evidence is inadmissible and inconclusive.

B. Wall failed to establish a genuine fact issue as to at least one element of his discrimination claims under the ADA and TCHRA.

1. Wall failed to show that he was a qualified individual with a disability, as required by the ADA.

For purposes of the summary judgment motion, the district court assumed that Wall was suffering from a disability under the ADA – that is, a physical or mental impairment that substantially limits one or more of an individual's major life activities as defined by 42 U.S.C. § 12101(A) – (C) (West Supp. 1994). Record at 388.[4]

As employee-plaintiffs are assigned the burden of establishing both their disability, and that they are otherwise qualified, *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994), the district court turned next to the issue of whether or not Wall had established that he was otherwise qualified for his CSS job. Record at 388-389. He had not. *Id.*

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[4] Wall notes in his Appellant's Brief that, "The district court found, based on the summary judgment evidence, that Wall has a disability as that term is defined by the statute." Appellant's Brief, p. 19. This misstates the district court's opinion, which contained merely an assumption of the fact of disability for purposes of summary judgement determination. Record 388.

a. The district court properly evaluated GTE's evidence regarding the essential functions of the CSS job.

Wall argues on appeal that the district court improperly ignored his evidence of essential functions and gave too much weight to GTE's evidence. Appellant's Brief, pp. 20-22. Wall points to the legislative history of the ADA to support his argument. *Id.* at 22. While the legislative history does caution against giving the employer's judgment of essential functions too much weight, it also recognizes that

> The point of including this phrase ["essential functions"] within the definition of 'qualified individual with a disability' is to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in question.

H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 55 (1990). Although the comments in the legislative history caution against giving a presumptive influence to the employer's opinion of essential functions, they also note that the language providing for the employer's definition to be considered

> . . . assures that the employer's determination of essential functions is considered. [But a] plaintiff may challenge the employer's determination of what is an essential function.

Id., pt. 3, at 34.

The only competent, persuasive evidence on the essential functions of the CSS job came from GTE's witness, Facility Supervisor Terry Lumpkin. Record at 310-311. Lumpkin, who worked out of the same Plano facility as Wall, and had served four years in a CSS position, gave a detailed explanation of the essential functions of the CSS job, as well as the business requirements of GTE with regard to the length of the shifts worked by its CSS's.

By contrast, Wall does not even offer an explanation of the essential functions of the CSS job. He does comment in his summary judgment affidavit that he believed he could lift the heavy tools and equipment required "provided I carried or lifted them within my restrictions." Record at 251. His lifting restrictions, by his own admission, as well as by his doctor's statement, limited him to carrying 35 pounds, which does not meet the lifting requirements described by Lumpkin. Record at 251, 311.

Rather than attempt to address the essential functions of the CSS job, Wall focuses on his contention that he could have worked four-hour shifts, avoided ladder use by working in exclusively buried cable areas and avoided standing for periods of time in excess of ten minutes. His attempt to raise an issue as to his ability to be a CSS for four hours a day fails because the only evidence he submits is testimony by fellow workers that they occasionally worked four-hour days when they took the rest of the day off as vacation or personal time. Record at 259. Clearly this is not an everyday occurrence, and does not address GTE's evidence that the CSS job is an eight-hour job. Record at 310-311. If a job requires

more hours to perform than an allegedly disabled person's abilities will allow, an employer does not have to accommodate the employee in that job. *Florence v. Frank*, 774 F.Supp. 1054, 1062 (N.D. Tex. 1991) (granting summary judgment for the defendant-employer).[5]

In a case with similar facts under the federal Rehabilitation Act of 1973, the court found that an employee whose disability limited his work capability to four hours a day was not entitled to "accommodation" that required a normal eight-hour job to be performed by him for half the day, and by another employee for the other half. If an essential function of the job would have to be eliminated to accommodate an employee's disability, the accommodation is not required. *Id.* The facts of this case are similar to those in *Florence*. Lumpkin establishes that Wall's four-hour restriction would have been inadequate to satisfy the requirements of the CSS job, and another worker would have had to perform his work. Record at 310-311.

In addition, Wall completely ignores the fact that his medical restrictions included one that he could not stand for more than 10 minutes. Record at 209. The Lumpkin Declaration sets forth in detail the reasons why a ten-minute standing limitation would render a person incapable of performing the CSS job. Record at 310-311. Standing for long periods of time is an essential function of the job. *Id.* The ADA and TCHRA both require that a "qualified" disability plaintiff be able to perform the job's

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[5] Although this case was decided under the Rehabilitation Act, and not the ADA, the principles are applicable.

essential functions despite a handicap or disability. In *Hilton v. Southwestern Bell Telephone Company*, this Court spoke to this issue. 936 F.2d 823, 829-830 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 913. In affirming a summary judgment for the employer, the Court relied in part upon Section 1.04(b) of the then-current version of TCHRA, which defined discrimination on the basis of handicap, as discrimination on the basis of a condition that does *not* impair an individual's ability to reasonably perform a job.[6] The Court said,

> . . . the obvious and only purposes of Section 1.04(b) of TCHRA is to shield employers from claims of discrimination by an employee whose physical or mental condition is a "handicap" which does in fact impair his 'ability to reasonably perform a job.' Simply put, TCHRA does not force employers to hire or retain a handicapped person who, because of his handicap, simply cannot perform a job."

936 F.2d at 830.

Wall's claim that he should have been allowed to attempt to perform the essential functions of the CSS position, like the employee-plaintiff in the *Florence v. Frank* case, must be rejected. *See* Appellant's Brief at 25. Wall's physician's statement restricted Wall from performing the essential functions of the CSS job. Record at 209-212 and 310-311. The ADA cannot be read to require that an employer to permit an employee to return to work

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[6] This definition appears in the new, codified TCHRA, found at Section 21.105 of the Texas Labor Code (Vernon Supp. 1994).

and do as much as he or she can take. *Derbis v. U.S. Shoe Corporation*, 3 AD Cases 1029, 1033 (D. Md. 1994).

The district court did not grant summary judgment against Wall because it ignored his evidence of essential functions; rather, Wall did not provide enough credible evidence to effectively challenge GTE's determination of essential functions. Although Wall freely alleges that he could have performed work in four-hour shifts and could have avoided working on a ladder by working only in buried cable areas, he provides no counter to Lumpkin's assertion that four-hour shifts on a regular basis would not satisfy GTE's customer service requirements, or that ladder work occurs even in buried areas, particularly where a CSS has to work under the eaves of a house. The issue of standing for periods of more than ten minutes was addressed only by Lumpkin, not by Wall. Wall simply did not satisfy his burden to raise a genuine fact issue on these matters.

b. Wall failed to show that he could have performed his CSS job with reasonable accommodation.

Wall relies heavily on what he calls his doctor's "recommendation" that he be placed in his CSS job on a trial basis. *See* Appellant's Brief at 5, 23. He contends that, once light duty work became unavailable in September of 1992, he should have been returned to his CSS position, notwithstanding that he had not presented any further release information from his doctor, and was still under the same severe restrictions as he was in July of 1992. A close look at Wall's doctor's statement reveals that Wall's

characterization of his doctor's position is false. The doctor's initial release, see Record at 209-210, says

> May return to work for trial work period 1/2 time, *with above restrictions.*

(emphasis added). The lifting and standing restrictions, as discussed previously, did not permit Wall to work as a CSS. The doctor's second statement, dated August 12, 1992, does not alter this position. Record at 211-212.

2. Wall failed to show that he was discriminated against by being removed from light duty.

The undisputed facts establish that Wall was not "terminated" by GTE either as discrimination because of his alleged disability, or in retaliation for his workers' compensation status. Instead, Wall abandoned his job after September 17, 1992, and never submitted a request to return to work or a medical release permitting him to do so. GTE did not "terminate" Wall – he was simply released from light duty. The decision to place Wall back on comp was based upon seniority, as required by the Collective Bargaining Agreement.

Wall's complaints that others were kept on light duty while he was not fails to address the seniority treatment required by the CBA. An employer is not required to accommodate a disabled employee if the accommodation would violate the Collective Bargaining Agreement. *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987); *Shea v. Tisch*,

870 F.2d 786, 789 (1st Cir. 1989).[7] In fact, even the duty to reasonably accommodate would not defeat the provisions of a Collective Bargaining Agreement unless it could be shown that the CBA had the effect or intent of discrimination. *Carter,* 822 F.2d at 469. Under TCHRA, effective discrimination based upon a bona fide seniority system is not a violation of the Act, as long as the plan is not a subterfuge to avoid the Act. Texas Labor Code, §21.102. The undisputed summary judgment evidence (and common sense) establishes that the seniority provision of the Collective Bargaining Agreement is clearly not designed as a subterfuge to avoid Texas anti-discrimination laws.

C. Wall's claim that "discrepancies in testimony" preclude summary judgment in this case is unfounded.

Wall argues that genuine issues of material fact are raised by several alleged inconsistencies in the summary judgment evidence. GTE will respond to each one as follows:

> (1) GTE stated that there was only enough light duty work for two employees, but Chlebowski was returned to full duty before Wall was removed from light duty, ostensibly leaving a light duty "slot" open for Wall, as the next senior employee. Appellant's Brief at 29.

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[7] Although these two decisions were decided under the Rehabilitation Act, which protects federal employees, their findings are instructive in interpreting employers' duties under the nearly identical ADA and TCHRA.

As previously stated, Wall presented no competent summary judgment evidence regarding Chlebowski's status; accordingly, he failed to establish an inconsistency in the evidence on this point.

> (2) GTE told Wall that return to work would require a full release to his CSS job. Wall contends that since his doctor's statement said his restrictions were permanent, this was, in effect, a discharge. Appellant's Brief at 30.

While it may be true that, if Wall could not return to his CSS job, his employment was effectively ended, the summary judgment evidence does not support his claim that GTE's requirement of a release was pretextual or discriminatory. As has been previously presented, Wall did not present sufficient evidence to establish that he was capable of performing the essential functions of his job under the ADA. Further, Wall himself is contradictory in his insistence that he should have been given more light duty work – either he was capable of performing his CSS functions or he was not.

> (c) More light duty became available after Wall was removed from light duty; thus, he could have been recalled to light duty. Appellant's Brief at 30-31.

Wall states in his own affidavit that,

> Steve Sanford was brought in to work light duty after I was taken off light duty. I was told this by Don Ingram or Keith Irwin, a Customer Service Specialist at GTE. I was not contacted by GTE to fill this light duty position that was given to Sanford.

Record at 253. This statement is hearsay and inadmissible. Further, it provides absolutely no context for the allegations made. Wall makes no effort to explain when Sanford was "brought in" to work light duty, for example. It would be completely irrelevant if Sanford was "brought in" after Wall effectively abandoned his job. Wall also does not disclose Sanford's respective seniority. If Sanford was more senior than Wall, then the CBA would dictate that he be chosen to perform any available light duty before Wall.

> GTE's Gina Logan testified that she did not know where Wall had moved, yet Wall claims that he told Logan, and that he received benefit checks from GTE in Angleton, his new location. Appellant's Brief at 32.

This is another red herring. Wall was not removed from light duty because GTE could not find him. Neither was he "terminated" because GTE could not find him. He does not identify the time frame in which he received benefits checks, so his attempt at impeaching GTE's position is ineffectual. His move to Angleton, in south Texas is some evidence of his job abandonment, but GTE's knowledge or lack of knowledge is immaterial to its employment actions. What is critical to Wall's case, and is a factor he completely ignores in the summary judgment evidence and arguments is why he did not respond positively to the letters GTE sent him inquiring as to his intentions.

Finally, the authority Wall cites for the proposition that "discrepancies in testimony raise credibility issues which are properly for the factfinder to weigh" is inapposite. Appellant's Brief at 29. In *Dibidale of Louisiana v.*

American Bank & Trust Co., this Court was reluctant to grant summary judgment in the face of inconsistencies between *a single witness's* own deposition and affidavit testimony. 916 F.2d 300, 307 (5th Cir. 1990) *mod.* 941 F.2d 309 (5th Cir. 1991). The inconsistencies alleged by Wall are not assigned to a single witness.

Wall's complaint that he was not kept on light duty is also inconsistent with his apparent claim that he could perform the essential functions of the CSS job, or could have been accommodated in that job. The light duty he was performing, as described by the Logan Declaration attached to GTE's Motion, did not include CSS functions.

D. GTE's summary judgment evidence that Wall abandoned his job is uncontradicted by Wall.

Wall completely fails to address his failure to respond to GTE's letters asking him what his intentions were after he was released from light duty. The letters from GTE fly in the face of his contention that GTE was "aware" that he could never return to his job (in his opinion). In fact, if this was true, then he does not qualify under either the ADA or the TCHRA, anyway. Both statutes require that, despite any disability, he be able to perform the essential functions of his job – if he was never going to be able to do so, then he doesn't qualify under either statute.

CONCLUSION

The district court correctly entered summary judgment for GTE in this case. Wall failed to adduce competent summary judgment evidence sufficient to raise a

material fact issue on critical elements of his prima facie cases for discrimination and retaliation under the ADA, TCHRA and former Article 8307C Texas Workers Compensation Act.

Accordingly, the judgment must be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing Brief for Defendant-Appellee has been served on Plaintiff-Appellant's attorney of record, John E. Wall, 3109 Carlisle, Suite 103, Dallas, Texas 75204, in accordance with the Federal Rules of Appellate Procedure, on this _____ day of _____, 1994.

_____

KATHLEEN BAGWELL PALTER